95-1225

No.

Supreme Court, U.S.
FILED
JAN 31 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
GILBERT S. ROTHENBERG
BRIDGET M. ROWAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

103pp

QUESTION PRESENTED

Whether the doctrine of equitable tolling may be applied to enlarge or suspend the statutory periods that limit (i) the time in which a claim for refund of income taxes may be filed (26 U.S.C. 6511(a)) and (ii) the amount of any recovery upon a timely filed claim (26 U.S.C. 6511(b)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement:	
A. *United States* v. *Brockamp*	4
B. *United States* v. *Scott*	10
Reasons for granting the petition	11
Conclusion	21
Appendix A	1a
Appendix B	17a
Appendix C	31a
Appendix D	35a
Appendix E	60a

TABLE OF AUTHORITIES

Cases:

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974)	19
Bowen v. *City of New York*, 476 U.S. 467 (1986)	19
Bull v. *United States*, 295 U.S. 247 (1935)	15
Burnett v. *New York Central R.R.*, 380 U.S. 424 (1965)	19
Capital Tracing, Inc. v. *United States*, 63 F.3d 859 (9th Cir. 1995)	18
Central Bank v. *First Interstate Bank*, 114 S. Ct. 1439 (1994)	18
First Alabama Bank, N.A. v. *United States*, 981 F.2d 1226 (11th Cir. 1993)	16
Girouard v. *United States*, 328 U.S. 61 (1946)	18
Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989)	20
Honda v. *Clark*, 386 U.S. 484 (1967)	19
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	7, 12, 14, 17, 19

Cases—Continued: Page

Jones v. *Liberty Glass Co.*, 332 U.S. 524 (1947) 18
Kingston Products Corp. v. *United States*, 368 F.2d 281 (Ct. Cl. 1966) 16
Kreiger v. *United States*, 539 F.2d 317 (3d Cir. 1976) 13, 14
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 12, 16
Miller v. *United States*, 38 F.3d 473 (9th Cir. (1994) 13
Oropallo v. *United States*, 994 F.2d 25 (1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994) ... 7, 8, 11, 12, 18
Republic Petroleum Corp. v. *United States*, 613 F.2d 518 (5th Cir. 1980) 16
Rosser v. *United States*, 9 F.3d 1519 (11th Cir. 1993) 16
United States v. *Dalm*, 494 U.S. 596 (1990) . 8, 11, 15, 17
Vintilla v. *United States*, 931 F.2d 1444 (11th Cir. 1991) 9, 11, 16, 17
Webb v. *United States*:
850 F. Supp. 489 (E.D. Va. 1994), aff'd, 66 F.3d 691 (4th Cir.1995) 9
66 F.3d 691 (4th Cir. 1995) 11, 13, 14, 15, 16, 18

Statutes:

Internal Revenue Code (26 U.S.C.):
§§ 1311-1314 17
§ 6511 ..... *passim*
§ 6511(a) 6, 8, 11, 12, 13, 15, 18
§ 6511(b) 6, 7, 8, 12, 13, 15, 18-19
§ 6511(b)(2) 12, 16
§ 6511(b)(2)(A) 12
§ 6511(b)(2)(B) 7, 12
§ 6511(d) (1988 & Supp. V 1993) 16, 17
§ 7422(a) 4, 6, 11
§ 7429 18

Miscellaneous: Page

Development in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950) 19
2 Wood, *Limitation of Actions* (4th ed. 1916) 19

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these two cases. See Rule 12.4 of the Rules of this Court.

OPINIONS BELOW

1. The opinion of the court of appeals in *United States* v. *Brockamp* (App., *infra*, 1a-16a) is reported at 67 F.3d 260. The opinion of the district court (App., *infra*, 17a-30a) is reported at 859 F. Supp. 1283.

2. The opinion of the court of appeals in *United States* v. *Scott* (App., *infra*, 31a-34a) is unreported, but the decision is noted at 70 F.3d 120 (Table). The opinions of the district court (App., *infra*, 35a-59a, 60a-76a) are reported at 795 F. Supp. 1028 and 847 F. Supp. 1499.

JURISDICTION

The judgments of the court of appeals in *United States* v. *Brockamp* (App., *infra*, 1a) and *United States* v. *Scott* (App., *infra*, 31a) were entered on October 5, 1995. On December 27, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511, provides in relevant part:

> **(a) Period of limitation on filing claim.**—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

> **(b) Limitation on allowance of credits and refunds.—**
>
> **(1) Filing of claim within prescribed period.**—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.
>
> **(2) Limit on amount of credit or refund.—**
>
> **(A) Limit where claim filed within 3-year period.**—If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.
>
> **(B) Limit where claim not filed within 3-year period.**—If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

> **(C) Limit if no claim filed.**—If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.
>
> * * * * *

2. Section 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a), provides:

> **No suit prior to filing claim for refund.**—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

STATEMENT

A. *United States* v. *Brockamp*

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. In 1984, Mr. McGill transmitted $7000 to the Internal Revenue Service in payment of income taxes for 1983. At the same time, Mr. McGill submitted a request for an extension of time for the filing of his return. He did not, however, thereafter file an income tax return or a claim for refund for the 1983 tax year. In 1984, McGill was 93

years old. According to respondent, he was "senile" and "mentally deranged" at that time (App., *infra*, 18a-19a).

Mr. McGill died in 1988. After respondent was appointed administrator of his estate, she wrote the IRS to request a refund of the taxes that he paid for 1983. She stated that "her father had been senile and had mistakenly sent a check for $7,000 instead of $700" to the IRS (App., *infra*, 19a). Respondent submitted an income tax return for Mr. McGill for the 1983 tax year which indicated that his liability for taxes for that year was $427 (*ibid.*).

The IRS denied the requested refund. The Service noted that the taxes were paid "more than three years prior to her claim" (App., *infra*, 19a) and that the requested refund was therefore barred by Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511.

2. Respondent thereafter commenced this tax refund action in federal district court on behalf of the estate. She contended (i) that the doctrine of equitable tolling applies to the limitation periods for income tax refunds under Section 6511 and (ii) that the claimed mental incompetency of Mr. McGill is a sufficient basis for equitable tolling to apply.[1]

---

[1] Respondent also contended that the $7000 payment made by Mr. McGill was only a "deposit"—and not a payment of taxes—and was therefore not subject to the limitation periods of Section 6511 (App., *infra*, 22a). The district court rejected that contention, noting that "[t]here is no evidence that the check was intended as a deposit" (*id.* at 23a). The court of appeals reversed the district court on other grounds and therefore did not find it necessary to address respondent's contention that the payment was a "deposit." See *id.* at 8a n.1 (Fernandez, J., dissenting).

The district court concluded that the doctrine of equitable tolling does not apply to the statutory limitations upon tax refund actions set forth in Section 6511 of the Code. The court first noted (App., *infra*, 20a) that Section 7422(a) of the Code specifies that courts may not exercise jurisdiction over a tax refund suit unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard" (26 U.S.C. 7422(a)). The court observed that the applicable "provisions of law" are contained in Section 6511(a), which provides that a claim for refund must be filed (26 U.S.C. 6511(a))

> within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Because the refund claim submitted by respondent fell outside these statutory periods, the district court concluded that it lacked jurisdiction over the suit under Section 7422(a) (App., *infra*, 21a, 29a-30a).

The court further noted that, "[i]n addition to the time limitations of Section 6511(a), Section 6511(b) limits the *amount* of a refund recoverable by a claimant" (App., *infra*, 21a (emphasis added)):

> Specifically, if a person files a timely claim within the three-year period mentioned in Section 6511(a), the amount of a refund is limited to
>
> > the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

> 26 U.S.C. § 6511(b)(2)(A). If, however, a claim was not timely filed within the three-year period mentioned in Section 6511(a), the amount of
>
> > refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.
>
> 26 U.S.C. § 6511 (b)(2)(B). * * *

The court explained that the provisions of Section 6511(b) that establish substantive limitations on the *amount* of any refund—even on a timely filed claim—are not subject to the doctrine of equitable tolling (App., *infra*, 21a-22a, 27a-28a).

The district court noted that in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court "recognized that the courts have traditionally declined to apply equitable principles in cases against the government because waivers of sovereign immunity are to be strictly construed" (App., *infra*, 25a, citing 498 U.S. at 96-99). In *Irwin*, however, the Court "changed its approach to the issue of equitable tolling against the government and held that" (App., *infra*, 25a, quoting 498 U.S. at 95-96)

> the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Several lower courts thereafter relied on *Irwin* to "extend[] the doctrine of equitable tolling to tax refund cases" (App., *infra*, 25a-27a, citing cases). The district court concluded, however, that those decisions were not correct. The court noted that in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), the First Circuit (in a

per curiam opinion joined by then-Judge Breyer) concluded that the "rebuttable presumption" that equitable tolling applies to suits against the government is inapplicable to tax refund suits because the "limitations imposed by Sections 6511(a) and (b) are fundamentally inconsistent with the doctrine of equitable tolling" (App., *infra*, 27a, citing 994 F.2d at 30-31). The district court also noted that in *United States* v. *Dalm*, 494 U.S. 596 (1990), this Court held that an equitable claim for recovery of a tax overpayment was not exempt from the limitation periods of Section 6511 (App., *infra*, 28a-29a, citing 494 U.S. at 610).

Applying the reasoning of *Oropallo* and *Dalm*, the district court held that the periods of limitation on refund claims and refund recoveries under Sections 6511(a) and (b) are not subject to the doctrine of equitable tolling. Because the refund claim in this case was filed outside those periods of limitation, the court entered judgment for the government (App., *infra*, 29a-30a).

3. The court of appeals reversed (App., *infra*, 1a-8a), with Judge Fernandez dissenting (*id.* at 8a-16a). The majority opinion stated that this Court's decision in *Irwin* "effectively limited the *Dalm* decision" and "requires that, in the absence of congressional action, statutes of limitation are, as a general rule, presumed to be subject to equitable tolling in suits against the United States" (*id.* at 5a). The court found nothing in the text or history of Section 6511 to indicate "any intention [by Congress] that equitable tolling should not apply to § 6511" (*ibid.*). The court therefore concluded that "the statute of limitations provided in § 6511 may be equitably tolled" (*ibid.*).

The court noted that, in contexts not involving tax refund claims, "several post-*Irwin* courts have held that mental incompetence will toll statutes of limitation in suits against the government" (App., *infra*, 7a, citing cases). The court stated that it agreed with those decisions because (*id.* at 8a)

> [p]rinciples of equity mandate that when mental incompetence precludes a person from asserting his rights during the proper time period, he should not be precluded from later seeking redress for his injuries.

Because a "triable issue of fact [exists] as to Mr. McGill's mental incompetence," the court of appeals reversed the decision of the district court and remanded for further proceedings (*ibid.*).

Judge Fernandez dissented from the decision of the court of appeals because "the principles of equitable tolling cannot be applied to § 6511" (App., *infra*, 9a, 10a):[2]

> [A]lthough *Irwin* creates a rebuttable presumption of equitable tolling in most areas, *Dalm* effectively rebuts that presumption because in it the Supreme Court determined that principles of equity would not be applied to toll § 6511.

---

[2] Judge Fernandez noted that several other courts have held that equitable tolling cannot apply to Section 6511. See App., *infra*, 10a-11a, citing *Vintilla* v. *United States*, 931 F.2d 1444, 1446-1447 (11th Cir. 1991); *Webb* v. *United States*, 850 F. Supp. 489, 491-493 (E.D. Va. 1994), aff'd, 66 F.3d 691 (4th Cir. 1995). The majority opinion in *Brockamp* did not address those conflicting decisions.

Judge Fernandez further noted that (*id.* at 13a)

> [a]s *Oropallo*, 994 F.2d at 27, pointed out, in addition to the limitations periods imposed by § 6511(a), subsection (b) of § 6511 places limits on the amount of any refund a claimant may receive. Under § 6511(b)'s provisions, [respondent] would not be able to collect any refund even if her suit were allowed to go forward under subsection (a) because the gap between the time that her father made the payments to the IRS and the time that she filed the refund claim is too great.

B. *United States* v. *Scott*

1. Respondent Nicholas Scott made payments of $30,096 for his 1984 tax liability. In 1989, respondent filed a tax return for 1984 claiming that he had no tax liability for 1984 and requesting a refund of the amounts he had previously paid. The Internal Revenue Service denied the requested refund because it was untimely under Section 6511 of the Code (App., *infra*, 32a).

Respondent then commenced this tax refund suit in federal district court. The court concluded that the doctrine of equitable tolling applies in tax refund suits and that the limitations of Section 6511 should be tolled in this case because respondent "was an alcoholic whose alcoholism rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989" (App., *infra*, 33a). The court therefore entered judgment for respondent.

2. The court of appeals affirmed, relying wholly upon the decision entered on the same day by the same panel in *United States* v. *Brockamp* (App., *infra*, 33a, 34a).[3] See pages 8-9, *supra*. Judge Fernandez again dissented, for the reasons set forth in his dissent in the *Brockamp* case (App., *infra*, 34a).

REASONS FOR GRANTING THE PETITION

The decisions entered by the Ninth Circuit in *Brockamp* and *Scott* conflict with the decision of the First Circuit in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), of the Fourth Circuit in *Webb* v. *United States*, 66 F.3d 691 (1995), and of the Eleventh Circuit in *Vintilla* v. *United States*, 931 F.2d 1444 (1991). By holding that the doctrine of equitable tolling may be applied to suspend or enlarge the limitations upon tax refund suits established by Congress in Section 6511 of the Internal Revenue Code, the Ninth Circuit decisions have created a conflict among the circuits on a recurring issue of substantial administrative importance.

1. Section 6511(a) of the Internal Revenue Code requires that a refund claim be filed within three years from the filing of the return or within two years from the time the tax was paid. 26 U.S.C. 6511(a). Compliance with that requirement is a condition of the government's waiver of its sovereign immunity. See 26 U.S.C. 7422(a); *United States* v. *Dalm*, 494 U.S. at 608 (citing cases). Moreover, "[i]n addition to the time limitations of Section 6511(a), Section 6511(b) limits the amount of a refund recoverable" on even a *timely* refund claim by specifying that any such recovery is limited to the amount of taxes paid in the three-year period preceding the

---

[3] *Brockamp* and *Scott* were consolidated for argument in the Ninth Circuit, and the decisions were entered by the same panel on the same day.

filing of a claim for refund made within three years of the return (26 U.S.C. 6511(b)(2)(A)) or, if no return was filed, the two-year period preceding the filing of the claim (26 U.S.C. 6511(b)(2)(B)) (App., *infra*, 21a).

a. In *Oropallo* v. *United States*, the First Circuit held that these statutory limitations on recovery in tax refund cases "may not be equitably tolled." 994 F.2d at 31. The court noted that Section 6511 contains more than a simple statute of limitations upon the filing of a refund claim (in Section 6511(a)); it also contains, in Section 6511(b), a substantive "limit on [the] amount of credit or refund" that may be paid on even a timely refund claim. 994 F.2d at 30, quoting 26 U.S.C. 6511(b)(2) (caption). The court observed that the substantive limitations on recovery in Section 6511(b) establish "more clearly than a simple limitations period would that Congress intended to establish an outside limit on the recovery of refunds." 994 F.2d at 30 n.7.

The court concluded that, "[b]y imposing an 'outside limit' or 'cut-off' on the amount of taxes which can be recovered, section 6511(b)(2)(A) [establishes] a 'period of repose inconsistent with tolling.'" 994 F.2d at 31, quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). The court therefore held that the "rebuttable presumption" that equitable tolling may apply to suits against the United States is inapplicable to the limitations on tax refund suits that Congress established in Section 6511. 994 F.2d at 29, citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95-96.[4]

---

[4] In the absence of the substantive limitations on the amount of recoverable taxes under Section 6511(b), the time limitations on the filing of a refund claim under Section 6511(a) would be sufficiently elastic to allow stale claims against the government. For example, a taxpayer theoretically could keep the limitations period of Section 6511(a) open indefinitely simply by reserving a small amount of the tax liability for payment. While the payment of a nominal balance years after the tax was originally due may meet the requirements of the two-year filing period of Section 6511(a), the separate limitations on the *amount* recoverable under Section 6511(b) express a policy of finality and repose that is inconsistent with equitable tolling.

The Ninth Circuit concluded in *Miller* v. *United States*, 38 F.3d 473 (1994), that the three-year rule of Section 6511(a) is unavailable for returns filed more than two years after payment of the taxes at issue. That conclusion is not inconsistent with the analysis of *Oropallo*, as the court of appeals suggested in this case (App., *infra*, 5a-7a n.1). Instead, the Ninth Circuit's opinion in *Miller* dealt with an issue that the First Circuit in *Oropallo* expressly "refused to decide" (38 F.3d at 475 n.1). That issue has no bearing on the analysis adopted by the *Oropallo* court or to the contrary analysis adopted by the Ninth Circuit in this case.

b. In *Webb* v. *United States*, the Fourth Circuit also held that the "rebuttable presumption" of equitable tolling in suits against the government does not apply to tax refund suits. 66 F.3d at 699. *Webb* involved an elderly taxpayer who had been victimized by the fraud of her advisors and whose refund claim was first advanced by the administrator of her estate. The Fourth Circuit noted that, prior to this Court's decision in *Irwin*, "there would seemingly be no question" that equitable tolling was inapplicable to tax refund suits (*id.* at 694):[5]

---

[5] Prior to *Irwin*, courts had rejected efforts to apply the doctrine of equitable tolling to tax refund suits. For example, in *Kreiger* v. *United States*, 539 F.2d 317 (3d Cir. 1976), the court stated that application of equitable tolling to tax refund suits would "run[] afoul of the well-established principle that

> Because a statute of limitations is a condition on the government's waiver of sovereign immunity and thus must be "strictly observed," *Block* [v. *North Dakota*, 461 U.S. 273, 287 (1983)], courts have traditionally declined to permit equitable considerations to toll statutes of limitations in cases against the United States. *See, e.g., Soriano v. United States*, 352 U.S. 270 (1957).

After *Irwin* was decided, however, the lower courts have been "divided * * * as to whether the rebuttable presumption of equitable tolling applies in tax refund cases" (66 F.3d at 696).

In *Webb*, the court explained that equitable tolling does not apply to tax refund suits for two essential reasons. First, the court noted that *Irwin* extends the rebuttable presumption of equitable tolling to suits against the government only when such tolling principles were already in place for similar suits against private parties. The court stated that, in *Irwin*, the Court sought to achieve "[e]qual treatment of private and government defendants" by ensuring that equitable tolling applies to suits against the government "*in the same way that it is applicable to private suits*" (66 F.3d at 696-697, quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95 (emphasis added by court of appeals)). The Fourth Circuit explained that, "[u]nlike tort actions or em-ployment disputes, however, tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants" (66 F.3d at 697). Noting

---

statutes of limitation applicable to suits against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed." *Id.* at 320.

that taxes "are the life-blood of government" (*id.* at 698, quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)), the court concluded that any assumption that equitable tolling should apply to Sections 6511(a) and (b) would not be based upon a realistic assessment of legislative intent. The court therefore held that "*Irwin*'s rebuttable presumption of equitable tolling is not applicable in tax refund suits" (66 F.3d at 699).[6]

Second, the court held in *Webb* that "[e]ven if *Irwin*'s presumption of equitable tolling were applicable in tax refund suits, the taxpayers would still not prevail here because that presumption is, in all events, rebuttable and has effectively been rebutted here" (66 F.3d at 699). In particular, the Fourth Circuit agreed with the analysis of the First Circuit in *Oropallo* that the combined time limitations of Sections 6511(a) and (b) are "inconsistent with equitable tolling" (66 F.3d at 701). The court noted that the substantive limitations on recovery contained in Section 6511(b) serve "as a separate and independent 'time barrier[]' to recovery, * * * a period of repose which itself, standing alone is

---

[6] The government contended in *Webb* that this conclusion follows from *United States* v. *Dalm*, 494 U.S. at 602. In *Dalm*, the Court held that the time limitations upon refund claims in Section 6511 of the Internal Revenue Code are jurisdictional and that a failure "to comply with these statutory requirements" bars any claim, whether based on law or equity. *Ibid.* The court of appeals noted in *Webb* that "the holding in *Dalm* is a strong indication by the Supreme Court, almost contemporaneous with the rule announced in *Irwin*, that equity is not to displace the strict time limits set forth in the Internal Revenue Code. * * * Significantly, the Supreme Court's opinion in *Irwin* did not purport to modify *Dalm*; indeed, *Irwin* failed even to mention *Dalm*" (66 F.3d at 698).

'inconsistent with tolling'" (66 F.3d at 700, quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. at 363, and *Oropallo* v. *United States*, 994 F.2d at 30).[7]

c. In *Vintilla* v. *United States*, 931 F.2d at 1446-1447, the Eleventh Circuit also concluded that the doctrine of equitable tolling does not apply to tax refund suits.[8] The court first noted that it had long held that "general principles of equity may not override statutory requirements for timely filing of tax refund claims." *Id.* at 1446, quoting *Republic Petroleum Corp.* v. *United States*, 613 F.2d 518, 527 (5th Cir. 1980), quoting *Kingston Products Corp.* v. *United States*, 368 F.2d 281, 288 (Ct. Cl. 1966). The court stated that its prior decisions were confirmed by this Court's explanation in *Dalm* of "the reasoning behind strict adherence to the limitations period in tax refund suits" (931 F.2d at 1446). See also note 6, *supra*. In particular, the court noted that Section 6511 contains a detailed scheme, with only limited exceptions, that limits recovery against the United States.[9] The court applied the reasoning of this

[7] Judge Russell dissented in *Webb*. In his view, "[l]ike any statute of limitations, § 6511(b)(2) can be equitably tolled in appropriate circumstances" (66 F.3d at 705).

[8] In two subsequent decisions, the Eleventh Circuit declined to reconsider whether equitable tolling applies to tax refund suits because, in those cases, even if equitable tolling *were* applicable, it would not have been available on the facts presented. See *Rosser* v. *United States*, 9 F.3d 1519, 1523 (1993); *First Alabama Bank, N.A.* v. *United States*, 981 F.2d 1226, 1228 (1993).

[9] Section 6511(d) of the Code extends the filing period for claims for refund with respect to specific types of income tax deductions and credits, none of which are involved in these

Court in *Dalm*, where the Court stated that a judicial broadening of the specific statutory exceptions from the limitations of Section 6511 "would be * * * little more than [an] overriding [of] Congress's judgment as to when equity requires that there be an exception to the limitations bar." 931 F.2d at 1446-1447, quoting *United States* v. *Dalm*, 494 U.S. at 610.[10]

d. By contrast with these decisions of the First, Fourth and Eleventh Circuits, the Ninth Circuit held in *Brockamp* and *Scott* that *Irwin* "requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States" (App., *infra*, 5a; see *id.* at 33a). Finding no evidence in the text or history of Section 6511 to

cases. See 26 U.S.C. 6511(d) (1988 & Supp. V 1993). Congress has also afforded relief from the limitations periods of Section 6511 in the so-called "mitigation provisions" of the Code, 26 U.S.C. 1311-1314. Those narrowly drawn provisions permit otherwise untimely claims to be advanced in situations involving inconsistent treatment of the same item in separate tax years and in a various other specified contexts. See *ibid.*

[10] In *Vintilla*, the court noted that *Irwin* was decided only nine months after *Dalm* and did not purport to alter, or even address, the conclusion in *Dalm* that equitable principles do not abrogate the requirement of "strict adherence to the limitations period in tax refund suits" (931 F.2d at 1446 & 1447 n.1). The court also observed that *Irwin* had stated that the principles of equitable tolling apply "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 1447 n.1, quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 96. The court noted that the taxpayers in *Vintilla* did not assert that they "fit into either of these categories." 931 F.2d at 1447 n.1.

establish "any intention [by Congress] that equitable tolling should not apply to § 6511," the court concluded that the limitations contained in Section 6511(a) and (b) "may be equitably tolled" (App., *infra*, 5a).[11] In so holding, the court expressly disagreed with the contrary analysis and conclusion of the First Circuit in *Oropallo* v. *United States*, 994 F.2d at 29-31. See App., *infra*, 5a-7a n.1; note 4, *supra*.[12]

In dissent, Judge Fernandez stated that he agreed with the analysis adopted by the First Circuit in *Oropallo* and would hold that equitable tolling is inapplicable to tax refund suits under Section 6511(a). He also noted that, under the provisions of Section 6511(b), a taxpayer whose claim is not filed within

[11] The fact that, after *Irwin* was decided, Congress "has done nothing" (App., *infra*, 5a) to resolve whether the doctrine of equitable tolling applies to tax refund statutes does not support the view that equitable tolling applies to those statutes. In *Irwin*, this Court, in adopting a *rebuttable* presumption, obviously did not purport to resolve that issue for every statute and also did not place on Congress the burden of thereafter reviewing the entire United States Code to specify which statutes are, and which are not, subject to equitable tolling. As this Court has observed, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). See also *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452-1453 (1994) (rejecting notion that congressional inaction in the face of prior judicial pronouncements is indicative of congressional acquiescence in those prior pronouncements); *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-534 (1947) (same).

[12] The court of appeals did not cite its earlier decision in *Capital Tracing, Inc.* v. *United States*, 63 F.3d 859 (1995), which concluded that the doctrine of equitable tolling applies in a wrongful levy suit brought against the government under 26 U.S.C. 7429. In *Webb*, the Fourth Circuit stated that it "d[id] not find *Capital Tracing* persuasive" (66 F.3d at 698 n.3).

three years of her return or within two years of the payment of the tax "would not be able to collect any refund even if her suit were allowed to go forward under [Section 6511(a)]" (App., *infra*, 13a). Judge Fernandez noted that this substantive restriction on the *amount* of refund for a *timely* claim is not subject to the principles of equitable tolling (*id.* at 14a-15a).[13]

[13] Whether viewed as a substantive rule of law limiting the amount of a tax refund, or as a "statute of repose" that is not subject to equitable tolling, Section 6511(b) of the Code expresses a clear intent to restrict the amount of any tax refund to that sum paid within the time periods that Congress specified. This substantive limitation on the "amount" of recovery is not subject to equitable modification by the courts. The doctrine of equitable tolling is confined, by its terms, to statutes of limitations. Suspension of a statute of limitations, historically, could be sought when the plaintiff suffered a legal disability that rendered a timely suit impossible. The disabilities that constituted a basis for tolling were generally limited to conditions such as childhood, insanity and imprisonment. See *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1229-1237 (1950); 2 Wood, *Limitation of Actions* 1069-1217 (4th ed. 1916). In an appropriate case, the doctrine of equitable tolling enables a plaintiff to obtain relief from the strict application of the statutory deadline for bringing his suit or claim. It has not, however, been extended to alter the substantive terms of the statute under which the plaintiff seeks relief. As this Court observed in *Irwin*, it is the "*[t]ime requirements* in lawsuits between private litigants" that are subject to the doctrine of equitable tolling. 498 U.S. at 95 (emphasis added). In each instance that this Court considered the doctrine, that premise has governed. See, *e.g.*, *Burnett* v. *New York Central R.R.*, 380 U.S. 424, 426 (1965); *Honda* v. *Clark*, 386 U.S. 484 (1967); *American Pipe & Con-struction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986). When a statutory condition *other* than a period of limitations for a filing requirement was at stake—such as limits on the *amount* of money recoverable—

2. The conflict among the circuits created by the decision in this case concerns a recurring question of substantial administrative importance. Many taxpayers undoubtedly suffer—or can later be claimed to have suffered—from diminished mental capacity to some degree or another through age, disease, trauma or a multitude of other causes. The decisions of the Ninth Circuit in the present cases provide a manifest opportunity for recurring litigation of factual disputes involving the circumstances that lead to untimely tax refund claims. As the substantial volume of post-*Irwin* decisions concerning claims of equitable tolling in tax refund cases reflects, the legal issue presented in this case has already been the subject of frequent litigation.

In the absence of a decision by this Court resolving the conflict among the courts of appeals, the treatment afforded to taxpayers who claim an equitable tolling of the statutory limitations upon tax refunds will differ based solely upon geographic happenstance. Resolution of this recurring issue is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws.

---

this Court has made clear that equitable tolling does not provide the claimant with relief from the statutory conditions. See *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (pre-lawsuit notification requirement not subject to equitable tolling).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
GILBERT S. ROTHENBERG
BRIDGET M. ROWAN
Attorneys

JANUARY 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-56424

D.C. No. CV-93-04601-RSWL

MARIAN BROCKAMP, ADMINISTRATOR AND SOLE RESIDUARY BENEFICIARY OF THE ESTATE OF STANLEY B. MCGILL, DECEASED,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California

[Filed Oct. 5, 1995]

Before FLETCHER, WIGGINS, and FERNANDEZ, Circuit Judges.
Ronald S.W. Lew, District Judge, Presiding.

OPINION

WIGGINS, Circuit Judge:

Marian Brockamp, the administrator and sole beneficiary of the estate of her father, Stanley B. McGill, brought an action for a refund of his April 1984 income tax overpayment. The district court granted summary judgment in favor of the United States, holding that the suit was precluded by the statute of limitations. We reverse and remand for further proceedings on Mr. McGill's mental incompetence.

BACKGROUND

In April 1984, Mr. McGill, who was 93 years old at the time, mailed a check to the Internal Revenue Service ("IRS") for $7,000, along with an application for an automatic extension of time to file his 1983 income tax return. He made no indication of his reason for sending the $7,000. Despite his extension request, Mr. McGill never filed an income tax return for 1983. More than two years later, on July 15, 1986, the IRS transferred the $7,000 from Mr. McGill's account into an "Excess Collection Account."

Mr. McGill died intestate on November 7, 1988 at the age of 98. During the administration of his estate, Mrs. Brockamp discovered the $7,000 payment and requested a refund. In a letter to the IRS, Mrs. Brockamp characterized her father as "senile" and stated that he had mistakenly sent the check for $7,000 rather than $700. On March 27, 1991, Mrs. Brockamp filed a tax return for Mr. McGill's 1983 tax liability. The IRS asessed $427 in taxes, and refused Mrs. Brockamp's refund request, based

on the statute of limitations provided in I.R.C. § 6511.

On August 3, 1993, Mrs. Brockamp filed suit against the United States seeking the return of the money paid by Mr. McGill. She argued that (1) the $7,000 check was a "deposit," rather than a payment, and therefore was not subject to the time limitations of § 6511, and (2) even if the $7,000 was a payment, her refund claim was not barred because the statute of limitations imposed by § 6511 was equitably tolled due to Mr. McGill's mental incompetence. The district court rejected both arguments. It concluded that the $7,000 was a payment, that equitable tolling never applies to tax refund cases, and, therefore, that the claim was barred by the statute of limitations. We conclude that equitable tolling can apply to tax refund cases, and we therefore reverse. We remand to the district court for a determination of Mr. McGill's mental capacity during the relevant time frame.

DISCUSSION

I. STANDARD OF REVIEW

A district court's construction and interpretation of the Internal Revenue Code is reviewed *de novo*. *Miller v. United States*, 38 F.3d 473, 475 (9th Cir. 1994).

II. MERITS

A. Tax Refund Claims are Subject to Equitable Tolling

I.R.C. § 6511(a) provides that a claim for refund of an overpayment must be filed within three years

from the time the return was filed, or, if no return was filed, within two years from the date the tax was paid. The court lacks jurisdiction over a claim that does not satisfy § 6511. *United States v. Dalm*, 494 U.S. 596, 602 (1989). Mrs. Brockamp obviously cannot meet the two year deadline, as the tax was paid in April 1984, and she did not file her refund claim until March 1991. Nor can she meet the three year deadline, because taxpayers who file returns more than two years after their taxes are paid cannot take advantage of the three year period following the filing of a return. *Miller v. United States*, 38 F.3d 473, 475 (9th Cir. 1994). Therefore, § 6511 bars Mrs. Brockamp's claim unless equitable tolling applies to lift that bar.

The government relies on *United States v. Dalm* to support its position that the principles of equitable tolling cannot be applied to § 6511. In *Dalm*, the Supreme Court considered whether equitable recoupment could serve as an independent basis for federal jurisdiction where the statutory requirements of § 6511 were not satisfied. The Court held that the doctrine could not be applied to toll § 6511. *Dalm*, 494 U.S. at 611.

Nine months later, however, in *Irwin v. Veterans Admin.*, 489 U.S. 89 (1990), the Supreme Court declared a new, general rule holding that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 95-96 (Title VII action). In *Irwin*, the court changed its method of evaluating the availability of equitable tolling. Specifically, the court stated:

> The continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. *We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the government.*

Id. at 95 (emphasis added). We believe that this language effectively limited the *Dalm* decision described above. *Irwin* requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States.

Congress has never expressed any intention that equitable tolling should not apply to § 6511. The specific language of the statute does not speak to the application of equitable tolling principles. Additionally, since the Supreme Court decided *Irwin* four years ago, Congress has done nothing to indicate that equitable tolling does not apply to § 6511. Furthermore, as the court in *Johnsen v. United States* noted, the legislative history of § 6511 "is absolutely devoid of any indication that Congress intended to preclude such equitable tolling in tax refund actions." 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991), quoted in *Scott v. United States*, 795 F. Supp. 1028 (D.Haw. 1992). We hold that in the absence of congressional action that indicates to the contrary, the statute of limitations provided in § 6511 may be equitably tolled.[1]

---

[1] The Supreme Court, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), held that the one-and-three-year structure of §§ 9(e) and 10(b) of the Securities Exchange Act of 1934 was "fundamentally incon-

We think that the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be

---

sistent" with the "venerable principle" of equitable tolling, despite acknowledging that time limits are "customarily" subject to such tolling. *Id.* That is, the Court noted that § 9(e)'s one-year provision required only that suit be filed within one year "after the discovery of the facts constituting the violation" and, consequently, set no real limit on when suit could be brought. Therefore, the three-year period also described served as a definitive "cutoff." *Id.* The Court reasoned that this cutoff clearly meant to place an outside limit on the open-ended one-year provision, and was convincing evidence of congressional intent. Accordingly, the Court held that "tolling principles do not apply to that period." *Id.*

The First Circuit subsequently relied upon Lampf in holding that equitable tolling could not apply in tax cases. See *Oropallo v. United States*, 994 F.2d 25 (1st Cir.1993). The *Oropallo* court noted that in the First Circuit, § 6511(a)'s time limitations are "totally illusory." *Id.* at 30. It therefore reasoned that the open-ended § 6511(a) was analogous to the open-ended one-year provision of § 9(e). The court then reasoned that the three-year "cut-off" provision of § 6511(b) was analogous to the three-year provision of § 9(e), in that both were definitive cut-offs meant to close the door on open-ended provisions. *Id.* at 31. Therefore, the court concluded that § 6511, like the Securities Exchange Act, could not be equitably tolled. *Id.* at 29-30.

Our circuit, however, has defined § 6511(a) in such a way that it is not, as it is in the First Circuit, an open-ended provision analagous to § 9(e):

> A two-year period for filing a claim is mandated by section 6511(a) in this case.
>
> . . . .
>
> To hold that the filing of a return more than two years after payment of taxes invokes the three-year period of § 6511(a) would reward strategic behavior on the part of the taxpayers and create a discrepancy in limitations

unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93 year-old man's senility. We find *Irwin* to be controlling and hold that, in the absence of congressional action, the principle of equitable tolling applies to tax refund claims.

B. Mental Incompetence Tolls the Statute of Limitations

In a prior case, we expressly left open the question of whether mental incompetence can toll a statute of limitations. *See Atkins v. Union Pac. R.R.*, 685 F.2d 1146, 1148 (9th Cir. 1982). We have held, however, that where "extraordinary circumstances beyond plaintiffs' control [make] it impossible to file the claims on time," equitable tolling applies. *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991). Recently, several post-*Irwin* courts have held that mental incompetence will toll statutes of limitation in suits against the government. *See, e.g., Nunnally v. MacCausland*, 996 F.2d 1, 4-5 (1st Cir. 1993); *Wiltgen v. United States*, 813 F. Supp. 1387, 1394-95 (N.D. Iowa 1992); *Johnsen v. United States*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991). We now

---

> periods that was not intended by the Internal Revenue Code.

Miller, 38 F.3d at 475-76. Because in this circuit § 6511(a)'s time limitation is not, as it is in the First Circuit, "totally illusory," § 6511(b) is not analogous to the three-year provision of § 9(e), either. In this circuit § 6511(b) does not close the door on an open-ended provision, as it does in the First Circuit. Because in this circuit § 6511(a) and (b) are not analagous to the one- and three-year provisions of § 9(e), we are not constrained, as was Oropallo, to conclude that *Lampf* precludes equitable tolling in tax cases.

join those courts and hold that mental incompetence constitutes a ground for equitable tolling. Principles of equity mandate that when mental incompetence precludes a person from asserting his rights during the proper time perod, he should not be precluded from later seeking redress for his injuries.

Viewing the facts of this case in the light most favorable to Mrs. Brockamp, there is a triable issue of fact as to Mr. McGill's mental incompetence. If Mr. McGill is found to have been mentally incompetent when he made the overpayment, tolling will allow Mrs. Brockamp to satisfy the statute of limitations provided in § 6511.

CONCLUSION

We hold that equitable tolling principles apply to tax refund cases. Further, we hold that mental incompetence can be a ground for tolling a statute of limitations. Accordingly, we reverse the district court's grant of summary judgment in favor of the government, and remand for further proceedings regarding Mr. McGill's mental competency.

FERNANDEZ, Circuit Judge, dissenting:

Under 26 U.S.C. §6511(a), Brockamp's claim for a refund of her father's 1983 taxes was untimely. *See Miller v. United States*, 38 F.3d 473, (9th Cir. 1994). Brockamp argues that even so the doctrine of equitable tolling should operate to relieve her from the time limitations of § 6511.[1]

[1] Another serious issue lurks in this case. Brockamp asserts that the amount paid to the government was a "deposit" rather than a "payment." Because the issue is not addressed by the majority and need not be, there is no reason for me to spill ink over it.

The Supreme Court has held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Veterans Admin.*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 457, 112 L. Ed. 2d 435 (1990) (Title VII action). At the same time, the Court has recognized that equitable tolling is traditionally extended only "sparingly," in two limited circumstances not at issue here.[2] *Id.* at 96, 111 S. Ct. at 457-58; *see also Scholar v. Pacific Bell*, 963 F.2d 264, 267-68 (9th Cir.) (noting that equitable tolling is available in "extreme cases" and has been applied "sparingly"), *cert. denied*, ——U.S. ——, 113 S. Ct. 196, 121 L. Ed. 2d 139 (1992).

Sparing or not, the principles of equitable tolling cannot be applied to § 6511. In *United States v. Dalm*, 494 U.S. 596, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990), decided nine months before *Irwin*, the Supreme Court held that the doctrine of equitable recoupment could not be applied to toll § 6511. The Court was not willing to allow that equitable doctrine to, in effect, extend the time that a taxpayer would have to apply for a refund of taxes. It approvingly pointed out that in the earlier case of *Bull v. United States*, 295 U.S. 247, 259, 55 S. Ct. 695, 699, 79 L. Ed. 1421 (1935), it had made it clear that even reliance on an inconsistent assessment by the Commissioner would not serve to "toll the statute

[2] Those circumstances are "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 96, 111 S. Ct. at 458 (footnotes omitted).

of limitations." 494 U.S. at 607, 110 S. Ct. at 1367. If the equitable recoupment principle was to apply at all, it had to be on a ground other than tolling.

The Court's holding applies with equal force to the present attempt to toll the statute of limitations on equitable grounds. Here, as there, the jurisdictional bar of § 6511 would have to be lifted. *See id.* at 608, 110 S. Ct. at 1368. As the Court said, "unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' may not be maintained in any court." *Id.* at 602, 110 S. Ct. at 1365 (citations omitted). Moreover, *Dalm* was an appealing taxpayer. She had not failed to pay her taxes or to file a return. But she was going to be required to pay twice. That was after the government had even assessed penalties and interest with respect to the gift taxes that it nearly conceded need not have been paid at all because what it really wanted was income taxes for the transaction. As the dissent said, the Court, in effect, held that the statute of limitations could not be tolled "by Government conduct that [the] Court [had] censured as 'immoral' and tantamount to 'a fraud on the taxpayer's rights.'" *Id.* at 612, 110 S. Ct. at 1370 (Stevens, J., dissenting); see also *Kolom v. United States*, 791 F.2d 762, 768 (9th Cir. 1986).

Thus, although *Irwin* creates a rebuttable presumption of equitable tolling in most areas, *Dalm* effectively rebuts that presumption because in it the Supreme Court determined that principles of equity would not be applied to toll § 6511. Other courts have recognized that. *See, e.g., Vintilla v. United States*, 931 F.2d 1444, 1446-47 & n.1 (11th Cir. 1991) (holding that, together, *Irwin* and *Dalm* bar equitable tolling of § 6511(a)); *Webb v. United States*, 850 F. Supp. 489, 491-93 (E.D.Va. 1994) (invoking *Dalm* and *Irwin* to hold that equitable tolling is inapplicable in tax refund cases).[3]

A different approach was taken in *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) (per curiam), *cert. denied*, —— U.S. ——, 114 S. Ct. 705, 126 L. Ed. 2d 671 (1994). The First Circuit held that the provisions of § 6511 cannot be equitably tolled, but it arrived at that conclusion by analogizing § 6511 to the provisions of the Securities Exchange Act of 1934 at issue in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). Even though under *Irwin* a rebuttable presumption of equitable tolling applied, the Court in *Lampf* held that the structure of the statutes at issue made clear that Congress intended to foreclose resort to equity to stretch the statutes' time limitations. *Lampf*, 501 U.S. at 363-64, 111 S. Ct. at 2782.

In *Oropallo*, the First Circuit rested upon an analogy to *Lampf* instead of an analysis of *Dalm* because it believed that *Irwin* had "changed [the Supreme Court's] approach to the issue of equitable tolling in suits against the government" from what it had been at the time of *Dalm*. 994 F.2d at 29. *Lampf*, according to *Oropallo*, "altered" "the relevant analysis" yet again. *Id.*

---

[3] But see *First Interstate Bank v. United States*, 874 F. Supp. 286 (D. Nev. 1994) (appeal pending); *Wiltgen v. United States*, 813 F. Supp. 1387 (N.D. Iowa 1992); *Johnsen v. United States*, 758 F. Supp. 834 (E.D.N.Y. 1991), in which the courts held that under *Irwin*, equitable tolling applies to § 6511(a).

However, given that the three cases were decided within thirteen months of each other, I believe that they should be read together if they can be reconciled.[4] *Lampf* expressly recognizes the rebuttable presumption principle of Irwin but holds that "the equitable tolling doctrine is fundamentally inconsistent" with the provisions of the Securities Exchange Act at issue. 501 U.S. at 363, 111 S. Ct. at 2782. Thus, *Lampf* and *Irwin* are compatible. Likewise, *Lampf*, *Irwin* and *Dalm* can be reconciled. Although *Dalm* does not use rebuttable presumption language, it recognizes, as was the case with the statutes in *Lampf* and their raison d'etre, that equitable tolling principles are inconsistent with the foundational underpinnings of the Internal Revenue Code. See *Webb*, 850 F. Supp. at 492 (applying *Dalm* broadly). That is because tax laws are "technical laws which are not subject to general principles of equity." *Oropallo*, 994 F.2d at 28 n.3 (citing *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 249, 75 S. Ct. 736, 744, 99 L. Ed. 1029 (1955), and *Ewing v. United States*, 914 F.2d 499, 501 (4th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S. Ct. 1683, 114 L. Ed. 2d 78 (1991)).

---

[4] The view that *Irwin* and *Dalm* complement each other—as opposed to the assumption in *Oropallo* that *Irwin* superseded *Dalm*—is also supported by the fact that in *Dalm*, Chief Justice Rehnquist and Justices Kennedy, White, Blackmun, O'Connor, and Scalia were in the majority, while Justices Stevens, Marshall and Brennan dissented. In *Irwin*, Justice Marshall joined the majority (in a concurrence), Justice Stevens again dissented, and Justice Souter, who had replaced Justice Brennan, did not take part in the decision. For *Irwin* to truly have been intended to render *Dalm* obsolete (an unlikely proposition particularly given that *Irwin* makes no mention of *Dalm*), six justices would have had to have changed their positions in the space of nine months.

Finally, when Congress has included specific exceptions in a statute of limitations, we should not readily read additional ones into it. See *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (holding [pre-*Irwin*] that equitable tolling cannot apply to the Fair Credit Reporting Act because Congress explicitly delineated certain exceptions to its statute of limitations, equitable tolling not among them); cf. *Dalm*, 494 U.S. at 610, 110 S. Ct. at 1369; *Parks Sch. of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Section 6511(c) contains an exception to the limitations period for those who negotiate an agreement for an extension of time with the IRS. Moreover, §§ 1311-1314 contain certain narrow "mitigation provisions" that extend the limitations period in some circumstances. Because Congress has specifically provided exceptions to the time requirements of subsections 6511(a) and (b), we should be chary of reading others into them, including equitable tolling.

In short, because, as recognized by the Supreme Court in *Dalm*, equitable principles are inconsistent with the statutory scheme of the Internal Revenue Code, I need not resort to a *Lampf*-style analysis in order to conclude that the district court should be affirmed. Nonetheless, *Oropallo's* elucidation of §6511 compared with the statutes at issue in *Lampf* does provide further support for my conclusion.

As *Oropallo*, 994 F.2d at 27, pointed out, in addition to the limitations periods imposed by § 6511(a), subsection (b) of § 6511 places limits on the amount of any refund a claimant may receive. Under § 6511 (b)'s provisions, Brockamp would not be able to collect any refund even if her suit were allowed to go forward under subsection (a) because the gap

between the time that her father made the payments to the IRS and the time that she filed the refund claim is too great.

Brockamp argues, however, that equitable tolling should also be applied to § 6511(b), which would then allow her to collect the full amount of the refund that she claims she is owed. *Oropallo*, 994 F.2d at 30, likened the interaction of subsections 6511(a) and (b) to the "1-and-3-year-structure" of the provisions at issue in *Lampf*, which required that an action under the Securities Exchange Act be brought within one year after the discovery of facts constituting the cause of action and in no event later than three years after the accrual of the cause of action. See 15 U.S.C. § 78i(e). The three-year provision in *Lampf* was found by the Court to be "a period of repose inconsistent with tolling." 501 U.S. at 363, 111 S. Ct. at 2782. As *Oropallo* recognized, the provisions of § 6511(b) also operate as a period of repose and impose an outside limit on recovery. See generally *Oropallo*, 994 F.2d at 28-31. The provisions of § 6511(b) were intended by Congress "to prevent a taxpayer from extending the time for filing a claim for the entire tax by making small payments from time to time." *Snyder v. United States*, 616 F.2d 1187, 1188 (10th Cir. 1980) (emphasis added) (citing S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)). In other words, even though the subsection "clearly operates like a statute of limitations," it more clearly imposes a period of repose so that the government may finally have closure as to particular tax returns. *Oropallo*, 994 F.2d at 30 n.7. I cannot say it better than the Court did in *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 301, 67 S. Ct. 271, 273, 91 L. Ed. 296 (1946):

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there would never come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

Brockamp presents the appealing argument that her aged father mistakenly remitted way too much money when he applied for an extension of time to file his income tax return for 1983. Basically, she argues that it is unfair to apply the statute of limitations to her. It is true that every statute of limitations has at least a tinge of unfairness because it can preclude the collection of past debts and the assertion of just claims against a person who *should* give the plaintiff recompense. That is why in a somewhat gentler era than ours Hoffman wrote, "I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious that he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his Knavery." 2 David Hoffman, A Course of Legal Study 751 Resolution XII (2d ed. 1836). Thus, I am not unsympathetic.

However, in the Internal Revenue Code Congress has attempted to create a tesselated scheme which assures that the government will receive needed revenues and that those receipts can, after a time, be

counted upon as it supplies services to the nation. Considering the complexity of the design, perfection cannot be expected. Considering the vast extent of the design and the numbers of people affected by it, the special thoughts, intentions, needs, and circumstances of each taxpayer cannot always be accommodated. So it is here.

Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT CALIFORNIA

No. CV 93-4601-RSWL (Sx)

MARIAN BROCKAMP, ADMINISTRATOR AND SOLE RESIDUARY BENEFICIARY OF THE ESTATE OF STANLEY B. MCGILL,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

[Filed July 26, 1994]

ORDER

LEW, District Judge.

Plaintiff Marian Brockamp and Defendant United States of America each move for summary judgment regarding Plaintiff's action for recovery of a federal income tax refund. The central issue in this case is whether the doctrine of equitable tolling applies to tax refund cases. After reviewing the arguments presented by both parties, this Court holds that equitable tolling does not apply in Plaintiff's case. Accord-

ingly, Plaintiff's motion for summary judgment is DENIED and Defendant's motion for summary judgment is GRANTED.

I. BACKGROUND

Plaintiff, Marian Brockamp, is the administrator and sole beneficiary of the estate of her father, Stanley B. McGill. On or about April 15, 1984, Stanley McGill mailed to the Internal Revenue Service (IRS) a check for $7,000 accompanied by an application for automatic extension of time (Form 4868) to file his 1983 income tax return. At the time, Mr. McGill was 93 years old and, according to Plaintiff, "mentally deranged."[1] Mr. McGill did not indicate on the check or elsewhere the purpose of the $7,000 check. Despite Mr. McGill's request for an extension of time, he never filed an income tax return for the 1983 taxable year.[2] On July 15, 1986, more than two years after receiving the $7,000 check, the IRS transferred the funds from Mr. McGill's account into an "Excess Collection Account."

Mr. McGill died intestate on November 7, 1988 at the age of 98. His daughter, Plaintiff Marian Brockamp, was appointed administrator of his estate on January 4, 1989. During the administration of the estate, Mrs. Brockamp discovered the $7,000 payment to the IRS and subsequently requested a refund.

---

[1] In a letter to the IRS. Plaintiff also characterized Mr. McGill as "senile."

[2] Because Mr. McGill did not file a return or another request for an extension of time, the IRS sent him delinquency notices on December 15, 1984 and February 18, 1985. There is no indication in the record that Mr. McGill responded to these notices.

In a handwritten letter dated March 13, 1991, Mrs. Brockamp asked the IRS to refund the money because her father had been senile and had mistakenly sent a check for $7,000 instead of $700. On March 27, 1991, Mrs. Brockamp also filed a tax return for Mr. McGill's 1983 tax liability and the IRS assessed $427.00 in taxes. On August 8, 1991, the IRS rejected Mrs. Brockamp's request for a refund. The IRS stated that she was not entitled to a refund because the $7,000 payment was made more than three years prior to her claim.

On August 3, 1993, Mrs. Brockamp filed suit against the United States seeking return of the funds paid to the IRS by Mr. McGill. Plaintiff moves for summary judgment against the United States by arguing that the $7,000 check was a deposit as a matter of law and should be returned to Mr. McGill's estate. Defendant, however, argues that the check was not a deposit but a payment and the applicable statute of limitations had run when Mrs. Brockamp filed a claim for a refund. In addition, Defendant contends that because the statute of limitations for Plaintiff's claim has expired and the doctrine of equitable tolling does not apply in this type of case, the Court must grant its own motion for summary judgment.

II. DISCUSSION

A. SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a mater of law. Fed. R.Civ.P. 56. Where the moving party does not have the burden of proof at trial on a dispositive issue, the moving party may meet its burden for summary

judgment by showing an "absence of evidence" to support the non-moving party's case. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The non-moving party, on the other hand, is required by FRCP 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. at 2553. The non-moving party can meet this requirement by presenting affidavits, depositions, answers to interrogatories or admissions on file. *Id.* Conclusory allegations unsupported by factual allegations, however, are insufficient to create a triable issue of fact so as to preclude summary judgment. *Exxon Corp. v. Fed. Trade Comm'n*, 663 F.2d 120, 127 (D.C.Cir.1980). Furthermore, a non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the (opposing party) on the evidence presented." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

B. JURISDICTION AND 26 U.S.C. § 6511

Federal district courts have jurisdiction over suits against the United States "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected. . . . ." 28 U.S.C. § 1346(a)(1). A district court may not entertain a suit, however, unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. §7422(a); *see also Miller v. United States*, 949 F.2d 708, 712 (4th Cir.1991) (stating that jurisdictional prerequisite is not waivable by the government). Most importantly, under 26 U.S.C. § 6511(a) a refund claim must be filed within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. 26 U.S.C. § 6511(a). Thus, Section 6511(a) distinguishes between taxpayers who file returns and those who do not. *See Oropallo v. United States*, 994 F.2d 25, 26 (1st Cir.1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994). Taxpayers who file returns have three years from the time they filed their return or two years from the time they paid their taxes to claim a refund. Taxpayers who have not filed returns, on the other hand, must file a claim for refund within two years of the alleged overpayment. *See* 26 U.S.C. § 6511(a); *Oropallo*, 994 F.2d at 26. A refund cause of action must be timely filed under one of the limitations periods in Section 6511(a) for the district court to obtain jurisdiction over the suit. *See United States v. Dalm*, 494 U.S. 596, 607, 110 S.Ct. 1361, 1368, 108 L.Ed.2d 548.

In addition to the time limitations of Section 6511(a), Section 6511(b) limits the amount of a refund recoverable by a claimant. Specifically, if a person files a timely claim within the three-year period mentioned in Section 6511(a), the amount of a refund is limited to

> the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

26 U.S.C. § 6511(b)(2)(A). If, however, a claim was not timely filed within the three-year period mentioned in Section 6511(a), the amount of

> refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

26 U.S.C. § 6511(b)(2)(B). Thus, if a claim was filed within three years of filing a return, Section 6511(b) explicitly forecloses any refund of taxes not paid within the three-year period preceding the date the claim for refund was filed. Section 6511(b) establishes an additional limitations period separate from the three-year time limitation period in Section 6511(a). *See Oropallo*, 994 F.2d at 27; *see also Mills v. United States*, 805 F.Supp. 448, 450 (E.D.Tex. 1992). In addition, if a return was not filed within the three-year period described in Section 6511(a), Section 6511(b) specifically precludes the refund of payments made before the two years preceding the date of the claim for refund. If, however, the remittance is not considered a "payment," the restrictions mandated under Sections 6511(a) and 6511(b)(2) do not apply.

C. WHETHER MR. MCGILL'S CHECK WAS A PAYMENT OR DEPOSIT

Plaintiff contends that the $7,000 check sent to the IRS is a "deposit" and is therefore not subject to the limitations period codified in Section 6511(a). Primarily, Plaintiff argues that because the IRS never made an assessment of the taxes owed by Mr. McGill, the $7,000 check was treated as a deposit and is not subject to Section 6511(a). Plaintiff's argument, however, is unavailing. Although the mere transfer

of money by a taxpayer is insufficient to classify the remittance as a payment, *see United States v. Dubuque Packing Co.*, 233 F.2d 453, 459 (8th Cir.1956) ("not every transfer of money by a taxpayer to a Federal tax authority will constitute a 'payment' . . . Some further act is necessary"), Mr. McGill's check was accompanied by an application for extension of time to file his 1983 tax return. Absent a designation by the taxpayer, a remittance with an application for extension of time to file a return is deemed a payment. See 26 U.S.C. § 6151(a) ("Except as otherwise provided . . . when a return of tax is required . . ." the taxpayer shall "pay such tax . . . at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)."); *Ehle v. United States*, 720 F.2d 1096, 1097 (9th Cir.1983); *Rose v. United States*, 256 F.2d 223, 226 (3d Cir.1958). In *England v. United States*, 760 F.Supp. 186 (D.Kan.1991), the court held that as a matter of law, remittances accompanied with an IRS Form 4868 application for extension are payments of estimated tax which are subject to the statute of limitations under Section 6511(a). *But see Risman v. Comm'r of Internal Revenue*, 100 T.C. 191, 199, 1993 WL 72856 (U.S.T.C.1993) (criticizing holding in *England* that filing of Form 4868 with remittance is automatically deemed an estimated payment). Similarly, in the present case Mr. McGill mailed a check for $7,000 accompanied with an application for a filing extension. There is no evidence that the check was intended as a deposit. Under the applicable IRS regulations, Mr. McGill was required to submit an estimated tax payment in order to avoid subsequent penalties. Thus, as the court in *England* held, the remittance of a check along with a request

for an extension of time is deemed a payment as a matter of law.

D. WHETHER THE DOCTRINE OF EQUITABLE TOLLING APPLIES TO PLAINTIFF'S CASE

As stated previously, a taxpayer must file a claim for refund with the IRS within three years of the date the return is filed or within two years of the date the tax is paid, whichever is later. 26 U.S.C. § 6511(a). In the present case, Mr. McGill sent the $7,000 check on or about April 15, 1984. Plaintiff then filed a refund claim nearly seven years later on March 13, 1991. Thus, Plaintiff's claim for refund was untimely because it was filed more than two years after the alleged overpayment was made by Mr. McGill.[3]

Although her claim was untimely, Plaintiff argues that the statute of limitations imposed by Section 6511(a) was equitably tolled because of Mr. McGill's mental incapacity. Defendant, however, contends that the prevailing case authority holds that equitable tolling is not applicable to tax refund cases and therefore Plaintiff's claim is barred by the statute of limitations. Accordingly, Defendant contends that

---

[3] At the time Plaintiff had filed the claim for refund, the IRS had not received a return for Mr. McGill's 1983 taxable year. Plaintiff submitted a return several days after making a claim for refund on March 27, 1991. Thus, the applicable time period under Section 6511(a) is the two year limitation for taxpayers who have not filed a tax return. Nevertheless, if the court were to find the late filing of Mr. McGill's tax return as the operative date Section 6511(b) would still preclude any recovery by Plaintiff.

this Court is without subject matter jurisdiction over Plaintiff's claim for a refund.

In support of the position that equitable tolling is applicable to her case, Plaintiff primarily relies on the Supreme Court's decision in *Irwin v. Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). In *Irwin*, the Supreme Court recognized that the courts have traditionally declined to apply equitable principles in cases against the government because waivers of sovereign immunity are to be strictly construed.[4] *Irwin*, 498 U.S. at 96-99, 111 S.Ct. at 458-59; *see Oropallo*, 994 F.2d at 28; *see, e.g., Ellis v. United States*, 229 Ct.Cl. 814 (1982); *Stepka v. United States*, 196 F.Supp. 184, 185 (E.D.N.Y.1961). The Court in *Irwin*, however, changed its approach to the issue of equitable tolling against the government and held that

> the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Irwin, 498 U.S. at 95-96, 111 S.Ct. at 457. Consequently, the Court in *Irwin* adopted "a more general rule to govern the applicability of equitable tolling in suits against the Government." *Id.*

---

[4] The Supreme Court granted certiorari "to determine when the 30-day period under [42 U.S.C. § 2000e-16(c)] begins to run and to resolve the Circuit conflict over whether late-filed claims [under § 2000e-16(c)] are jurisdictionally barred." *Irwin*, 498 U.S. at 92, 111 S.Ct. at 455. Thus, unlike the present case, the case in *Irwin* involved a Title VII discrimination suit.

By relying on *Irwin*, several lower courts have extended the doctrine of equitable tolling to tax refund cases. For example, in *Scott v. United States*, 795 F.Supp. 1028 (D.Haw.1992), the plaintiff filed a tax refund suit after the IRS denied his request for a refund. The IRS asserted that the claim was untimely under 26 U.S.C. § 6511. *Id.* at 1030. The plaintiff conceded that the refund claim was untimely but argued that his mental incompetency equitably tolled the statute of limitations. *Id.* The government moved to dismiss the plaintiff's cause of action by arguing that the court lacked subject matter jurisdiction over the case. *Id.* The district court, however, denied the government's motion and found that "[t]he Irwin Court recognized that the statute of limitations may be equitably tolled even where the statute of limitations is a prerequisite to federal court jurisdiction. . . ." *Id.* at 1031. Noting that Irwin involved an untimely Title VII claim, the court in Scott nevertheless held that "the reasoning in [Irwin] applies with equal force to untimely tax claims." *Id.* at 1031.

In addition to the district court's decision in Scott, several other lower courts have extended the doctrine of equitable tolling to tax cases. *See, e.g., First Alabama Bank v. United States*, 981 F.2d 1226, 1228 (11th Cir.1993) (assuming under Irwin that "the statute of limitations governing tax refund suits . . . may under some circumstances be equitably tolled"); *Wiltgen v. United States*, 813 F.Supp. 1387 (N.D. Iowa 1992) (relying on *Irwin* in applying equitable tolling to tax refund claim); *Johnsen v. United States*, 758 F.Supp. 834, 835 (E.D.N.Y.1991) (same). Plaintiff relies on the Supreme Court's state-

ment in Irwin and the post-*Irwin* cases extending the equitable tolling doctrine to tax cases in opposition to Defendant's motion for summary judgment. Despite these cases, however, the more recent weight of authority rejects the application of equitable tolling in tax refund cases.

E. Oropallo v. United States

In *Oropallo* v. *United States*, 994 F.2d 25 (1st Cir.1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994), the First Circuit conducted a thorough analysis of whether equitable tolling applies to tax refund claims in light of Irwin and the Supreme Court's more recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). Recognizing that *Irwin* extended equitable principles to cases against the government, the First Circuit concluded that the Supreme Court's decision in *Lampf*, rejecting equitable tolling for suits under the securities laws, altered the Court's analysis. *Oropallo*, 994 F.2d at 30-31. The Court in *Oropallo* found that the limitations imposed by Sections 6511 (a) and (b) are fundamentally inconsistent with the doctrine of equitable tolling. *Id.* Consequently, *Oropallo* held that Section 6511(a), which limits refunds recoverable to the amount of tax paid in the three-year period immediately preceding the filing of a claim, may not be equitably tolled. *Id.* at 28.

In *Oropallo*, a taxpayer discovered he had overpaid his taxes by $698.00 and sought a refund nearly 8 years later, which the IRS rejected as untimely. *Id.* at 25. The taxpayer filed suit against the government, arguing that the limitations period of Section

6511 should be equitably tolled due to his incarceration and alleged carbon monoxide poisoning, which rendered him incapacitated for several years subsequent to the tax overpayment. *Id.* The Court of Appeals, however, rejected his claim, stating that "the three-year period in section 6511(a) gives the taxpayer ample time to file a refund claim, and there is no need to toll that period." *Id.* at 30. The court further found that, except in clearly unique situations which did not apply here, the limitations period in Section 6511 have not been equitably tolled. *Id.* at 28. The time limitation of Section 6511 is 'inflexible' and so not tolled by the taxpayer's mental incompetency; there are only 'rare exceptions' to the 'rigid prevailing rule[] that such statutes of limitations cannot be extended in any circumstances,' *e.g.*, the prisoner of war or fraud situation. *Id.* (*quoting Stepka v. United States*, 196 F.Supp. 184, 185 (E.D.N.Y.1961) (finding that no exception to the time limit should be made because of mental incompetency)).

Oropallo is similar to the present case. Here, Plaintiff discovered the tax over-payment and sought a refund seven years later. Like the plaintiff in *Oropallo*, Plaintiff here argues equitable tolling should apply given her fathers incapacitation. Plaintiff's argument that her father was "mentally deranged and senile, however, fails to meet the "clearly unique exception which may allow equitable tolling to apply. *Oropallo*, 994 F.2d at 28.

F. Dalm v. United States

In *United States v. Dalm*, 494 U.S. 596, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990), the Supreme Court

considered the issue of whether the doctrine of equitable tolling provided a jurisdictional basis for independent suits to recover a gift tax refund, after the time for filing had expired. Holding that the district court lacked jurisdiction over the refund suit, the court stated:

> [U]nless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected' . . . may not be maintained in any court.

Id. at 602, 110 S.Ct. at 1365 (citing *United States v. Kales*, 314 U.S. 186, 193, 62 S.Ct. 214, 217, 86 L.Ed. 132 (1941)). The fact that a taxpayer does not learn until after the limitations period has run that the tax was paid in error, and that he or she has ground upon which to claim a refund, does not operate to lift the limitations bar. *Dalm*, 494 U.S. at 607-11, 110 S.Ct. at 1367-69. The court stated: "were we to allow her to maintain a suit for refund on the basis of equitable recoupment, we would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar." *Id.* at 610, 110 S.Ct. at 1369.

The present case is also similar to *Dalm*, where a taxpayer sought a gift tax refund seven years later, even though she was required to file her claim within three years of when the original return was filed. In rejecting her claim, the Supreme Court found that the doctrine of equitable recoupment will not provide jurisdictional basis for independent suits against the Government, after the time for filing a

refund claim has expired. *Id.* at 604-07, 110 S.Ct. at 1365-67. Applying the Court's analysis in *Oropallo* and *Dalm* to the present case, this Court holds that the doctrine of equitable tolling is inapplicable and summary judgment in favor of Defendant is appropriate. Accordingly, the Court hereby GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's motion for summary judgment.

The Court hereby incorporates Defendant's Statement of Uncontroverted Facts and Conclusions of Law.

IT IS SO ORDERED.

APPENDIX C

[Filed Oct. 5, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15321

D.C. No. CV-92-00011-ACK

NICHOLAS T. SCOTT, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

No. 94-15323

D.C. No. CV-92-00011-ACK

NICHOLAS T. SCOTT,
PLAINTIFF-APPELLEE/CROSS-APPELLANT

v.

UNITED STATES OF AMERICA;
IRS, Director,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted June 5, 1995
Pasadena, California

MEMORANDUM *

Before: FLETCHER, WIGGINS, FERNANDEZ, Circuit Judges

BACKGROUND

In the early 1980s, Nicholas Scott began to experience severe difficulties resulting from his alcohol abuse, including multiple citations for driving under the influence of alcohol and the loss of his job. He turned over power of attorney for his financial affairs to his father. In 1984, pursuant to the power of attorney, Mr. Scott's father made a number of federal tax deposits on Mr. Scott's behalf. Then, after Mr. Scott revoked the power of attorney, he himself made a final estimated tax payment in January 1985. Altogether, the payments made toward Mr. Scott's 1984 taxes totaled $30,096. In actuality, Mr. Scott had no tax liability that year.

Mr. Scott filed tax returns for the 1984-88 tax years on November 29, 1989 and claimed a refund of $30,096 plus interest. The Internal Revenue Service ("IRS") disallowed Mr. Scott's refund claim due to the expiration of the statute of limitations for filing a claim based on 26 U.S.C. § 6511. Mr. Scott subsequently filed the present action.

The district court made two key holdings in this case. Assuming that Mr. Scott's request for a refund was barred by the statute of limitations contained in the tax code, the court first ruled that equitable tolling principles can apply to tax cases.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The district court then held that a taxpayer's mental incompetence could operate to toll the limitations period for a tax refund claim during the time the taxpayer was mentally incompetent. Accordingly, the district court proceeded to a bench trial to determine Mr. Scott's competence.

At the bench trial, expert witnesses on behalf of both the government and Mr. Scott testified that alcoholism is a disease than can lead to mental incompetence. The district court resultantly found that Scott was an alcoholic whose alcoholism rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989. The court thus ruled that the statute of limitations did not bar Scott's claim for the $30,096 refund. The Government appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

DISCUSSION

In a similar case, argued before us at the same time as this one, we held that equitable tolling can apply to tax cases, and that mental incompetence can provide a ground for such tolling. *See Brockamp v. United States*, No. 94-56424, slip op. —— (9th Cir. Oct. 5, 1995). Accordingly, these two holdings of the district court are affirmed.

As to the district court's factual finding that Mr. Scott was mentally incompetent during the relevant period, this finding was well supported. The district court noted that the determination whether a particular taxpayer suffers from severe enough alcoholism to toll the statute of limitations is to be made on a case-by-case basis. The district court reviewed extensive trial evidence, including expert reports, con-

cerning Mr. Scott's alcoholism and mental incompetence. The court's resultant finding, that Mr. Scott was indeed mentally incompetent to the point that he was unable to file a tax return during the relevant period, was not clearly erroneous. *See Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 2125 (1994).

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

FERNANDEZ, Circuit Judge, dissenting:

I dissent for the reasons set forth in my dissenting opinion in *Brockamp v. United States*, No. 94-56424, slip op. —— at —— (9th Cir. —— 1995).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

No. 92-00011

NICHOLAS T. SCOTT, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Nov. 19, 1993]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KAY, Chief Judge.

THIS MATTER came before the Court for trial on October 5, 1993 through October 7, 1993. Having considered the testimony and other evidence presented, the Court enters its findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

BACKGROUND

Plaintiff Nicholas T. Scott ("Scott") brought this action to recover an overpayment of federal income taxes for 1984. On November 28, 1989, by filing a tax return for the 1984 taxable year, Scott made his refund claim to the Internal Revenue Service ("IRS"). The IRS refused Scott's refund claim, asserting that the statute of limitations for filing it

had expired. Scott contends that equitable tolling principles prevent his refund claim from being time-barred. He specifically argues that from the time his 1984 tax return was due to the time he actually filed that return, he suffered from severe alcoholism, which caused him to be mentally incompetent and incapable of filing a tax return. Thus, the central issues in this case are whether Scott was incompetent from the time his 1984 tax return was due to the time he actually filed that return, and, if so, whether his incompetency tolls the statute of limitations.

As an initial matter, this Court holds that any finding of fact which may be deemed, in whole or in part, more properly a conclusion of law shall be deemed as such, and any conclusion of law which may be deemed, in whole or in part, more properly a finding of fact shall be deemed as such.

FINDINGS OF FACT

A. *Scott's Refund Claim*

1. This is a federal income tax refund suit involving an overpayment of taxes by Scott for the calendar year 1984.

2. In 1984, after Scott received an inheritance, he invested that money in a partnership known as "Wine Horizons," a business which operated a retail wine store in Danville, California.

3. Prior to that time, around 1980, Scott gave a power of attorney to his father, Gene Scott. Gene Scott demanded the power of attorney when he learned that Scott had failed to file and pay federal income tax for previous years.

4. During 1984, in accordance with the terms of the power of attorney, Gene Scott made federal tax deposits on Scott's behalf. In December 1984 or January 1985, Gene Scott revoked the power of attorney by tearing it up. At the time he tore up the power of attorney, Gene Scott insisted that Scott make his last estimated tax payment for 1984, which was due in January 1985. Scott made the final payment in a timely fashion.

5. Scott paid a total of $30,096.00 to the IRS for application to his 1984 federal income taxes.

6. Scott had no tax liability for 1984.

7. Scott's 1984 tax return was due on April 15, 1985.

8. Scott filed a tax return for the 1984 taxable year on November 29, 1989. Through that tax return, Scott sought a refund of the $30,096.00, plus interest.

9. The IRS denied the claim for refund, maintaining that the statute of limitations for filing a refund claim had expired. The United States cites the applicable statute of limitations as 28 U.S.C. § 6511.

10. On January 8, 1992, shortly after the IRS denied his claim, Scott filed this action to recover the overpayment of the $30,096.00, plus interest. Scott asserts that his refund claim is not time-barred under equitable tolling principles because, from the time his 1984 tax return was due to the time he actually filed that return, he was mentally incompetent as a result of his alcoholism.

B. *Scott's Alcoholism*

11. From the early 1980's through at least early November 1989, Scott was a severe alcoholic. Scott

presented testimony from several witnesses chronicling his alcoholism. The evidence of Scott's alcoholism is overwhelming. Below are examples of this evidence:

(a) In the early 1980's, Scott began drinking large quantities of alcohol. Scott drank so heavily that he began to suffer from blackouts on a nearly daily basis, particularly in 1986 and 1987. Also because of his heavy drinking, Scott's father held a power of attorney for him from around 1980 to January 1985.

(b) Scott's heavy drinking caused him to be suspended from the California bar for failure to pay his bar dues.

(c) Scott's heavy drinking resulted in several failed relationships with women.

(d) In 1980, Scott was in a car accident because of his drinking.

(e) In 1981, Scott lost a job as an attorney because of his drinking.

(f) From 1982 through 1986, Scott received five citations from the State of California for driving under the influence of alcohol (DUI). The dates of the DUI violations include: (1) October 22, 1982; (2) July 15, 1986; (3) July 18, 1986; (4) August 14, 1987; and (5) January 2, 1988.

(g) From 1984 to July 1987, the entire time Scott operated Wine Horizons, Scott spent most of his time buying wine for the store, engaging in wine tasting sessions with his customers, and drinking wine and vodka. Because wine was not always strong enough for Scott, Scott would fill a glass full of vodka and then add a few

drops of wine to make the vodka appear to be wine.

(h) Also during the entire time Scott operated Wine Horizons, Scott paid no attention to bills or operation of the books. These matters were handled by others. Moreover, all partnership documents, sales tax returns, and other documents were prepared by others.

(i) In 1985, Scott's long-time girlfriend was killed in a car accident, causing Scott to become very depressed and to increase his alcohol intake to even greater levels.

(j) In 1985, Scott's heavy drinking caused his partner in Wine Horizons to walk out on him. Even at the time the partnership agreement was entered into in 1984, Scott and his partner added an addendum to the agreement addressing the partner's concern over Scott's potential incapacity due to alcohol abuse.

(k) In January 1987, due to his alcoholic state, Scott failed to pay the rent for his wine store, Wine Horizons. As a result, he entered into a stipulation with his landlord in which Scott agreed to pay the rent owed on a certain time frame, and, if he failed to do so, Scott's landlord was empowered to file an *ex parte* application which would allow the landlord to obtain a writ of execution on the entire inventory of Wine Horizons. This stipulation was filed in the Superior Court of the State of California, County of Contra Costa on February 9, 1987. Judgment was entered on the stipulation on June 3, 1987.

(l) In February 1987, Scott's landlord insisted that David Green, an employee of Scott, run the wine shop's operations because, due to Scott's alcohol abuse, the landlord had little confidence in Scott's competence to run it.

(m) Scott failed to pay the rent as specified in the February 1987 stipulation with his landlord, and, on July 2, 1988, Scott received a notice of default. The notice informed Scott that the writ of execution on Wine Horizons' inventory would be executed on July 10, 1987 if Scott did not pay the rent owed.

(n) Scott kept his personal collection of wines, worth about $30,000.00, at Wine Horizons. His personal collection was not part of Wine Horizons' inventory. Even though Scott knew that his personal collection would be seized with Wine Horizons' inventory if he did not remove it from the store, Scott did nothing to protect his personal collection because his alcoholic state made him apathetic and uncaring about anything but his next drink. Scott ignored the pleas of friends urging him to protect his personal collection of wine.

(o) When the writ of execution was executed on July 10, 1987, Scott simply remained in the store, drinking, as the sheriff took away the inventory.

(p) With regards to the August 14, 1987 DUI violation, Scott was sentenced to 30 days in prison and 10 days at DUI school. Any person showing up to the DUI school while intoxicated would be thrown out of the school. Scott was thrown out of the school because he showed up

with alcohol on his breath. Scott served the 30 days of prison starting sometime in mid-August 1987 through sometime in mid-September 1987.

(q) After Scott was released from prison in mid-September 1987, he attended the public sale of Wine Horizons' inventory. Scott believed the wine was being sold to his landlord's attorney through a strawman and believed this to be illegal. Nevertheless, Scott's alcoholic state prevented him from objecting to the sale.

(r) Sometime after the public sale of Wine Horizons' inventory, Scott was evicted from the building in which Wine Horizons had operated. When he was evicted, Scott did not even attempt to safeguard or rescue his business records.

(s) For Scott's fourth and fifth DUI violations, Scott was incarcerated from about November 23, 1987 to September 1, 1988. When incarcerated during this period, Scott was a member of an alcoholic rehabilitation program at prison, known as the Deuce Program. As part of this program, Scott was allowed supervised releases from prison, normally for 48 hours every two weeks. On January 2, 1988, the date of Scott's fifth DUI violation, Scott had been released from prison on the order of a California state judge so that he could help his girlfriend move into a new apartment. Despite the fact that Scott obtained an additional DUI while on release, Scott was not removed from the Deuce Program, and, was still allowed releases from prison. During Scott's 48-hour releases from prison, Scott would drink continuously.

(t) As soon as Scott was released from prison in September 1988, Scott immediately became intoxicated.

(u) Several days after his release from prison, Scott's sister urged him to pay his federal income taxes. At her continued insistence, Scott finally obtained an accountant to prepare the income tax returns. Scott obtained the accountant sometime in January 1989, but, because of his alcoholic state, did not get the necessary documents to the accountant until shortly before the 1984 tax return was filed in November 1989.

12. In addition to these examples, the expert testimony in this case, discussed below, supports a finding that Scott suffered from severe alcoholism from the early 1980's through at least early November 1989.

C. *Scott's Mental Competency*

1. *Expert Testimony*

13. Dr. Gerald McKenna, M.D., testified as an expert witness for the United States. Both parties agreed that Dr. McKenna is highly qualified to testify about the subject of the effect of alcohol abuse on a person's mental competency. Dr. McKenna's Curriculum Vitae, expert report and expert testimony support a finding that Dr. McKenna is an expert on this subject. Based on the foregoing, this Court finds that Dr. McKenna is an expert qualified to testify about the effect of alcohol abuse on a person's mental competency.

14. Dr. Patrick Norman, M.D., testified as an expert witness for Scott. Both parties agreed that Dr. Norman is highly qualified to testify about the subject of the effect of alcohol abuse on a person's mental competency. Dr. Norman's Curriculum Vitae, expert report and expert testimony support a finding that Dr. Norman is an expert on this subject. This Court finds that Dr. Norman is an expert qualified to testify about the effect of alcohol abuse on a person's mental competency.

15. In forming their expert opinions, both Dr. McKenna and Dr. Norman relied on the same evidence that each party presented to the Court during the trial on this matter, including, but not limited to, the facts as described in Part B.

16. Dr. McKenna and Dr. Norman were in agreement about Scott's mental competency, an unusual circumstance in this Court's experience. They testified that:

(a) Alcohol is a drug which can lead to mental incompetence if used in sufficient doses and over a long enough period of time. The degree of mental incompetence is directly related to the dosage of alcohol and the length of time over which high doses of alcohol have been consumed. High doses of alcohol induce blackouts.

(b) Alcoholism is a disease, not a wrongful or reprehensible act.

(c) Scott suffered from severe alcoholism from the early 1980's to at least early November 1989.

(d) Scott was mentally incompetent from, at least, January 1985 through September 1987 and September 1988 through November 1989, and, as a result, did not have the mental capacity to file his tax return during this period.

(e) As to Scott's mental condition while in jail from September 1987 through September 1988, the experts testified to the following:

(i) While both experts were not precisely certain as to whether Scott was mentally incompetent while in jail between September 1987 and September 1988, both of them agreed that there is a residual impact from alcohol abuse which delays the recovery of cognitive abilities. They both further agreed that it is not necessary to have alcohol in your system to experience the residual impact and to remain mentally incompetent.

(ii) Dr. Norman also testified about the dry drunk syndrome where incompetence from alcoholism is retained if the alcoholic is not committed to rehabilitation. Dr. McKenna did not challenge Dr. Norman's testimony regarding the dry drunk syndrome.

17. Based on this expert testimony concerning the residual impact of alcohol abuse and the dry drunk syndrome, and based on the fact that, when Scott was released from the Deuce Program every two weeks, Scott constantly drank during the release, this Court finds that Scott also suffered from severe alcoholism during his term in jail from September 1987 to September 1988, and, as a result, was mentally incompetent to file his tax return during this period.

2. *United States' Counter-Argument*

18. The United States attempted to counter the expert witnesses' testimony that Scott was mentally incompetent. Some of the facts which the United States highlighted to argue Scott was competent to file a 1984 tax return include:

(a) In 1984, Scott executed a partnership agreement to operate Wine Horizons.

(b) In 1985, Scott entered into an agreement dissolving the partnership so that he could operate Wine Horizons on his own.

(c) During the time he operated Wine Horizons, Scott filed state sales tax.

(d) Scott obtained an attorney to represent him on his 1987 and 1988 DUI charges.

(e) Scott opened and closed his retail business everyday.

(f) Scott paid his utilities and rent.

19. As detailed above, Scott explained that most of these matters were initiated and handled by persons other than himself. Additionally, the attorney who represented him on the DUI charges was not retained to do anything regarding Scott's tax affairs.

20. The facts highlighted by the United States to establish that Scott was competent to file his tax return were before Dr. McKenna and Dr. Norman when they formed their opinions about Scott's mental competency.

21. Without the expert testimony in this case, the Court might otherwise find the United States' argument somewhat persuasive. Given that the expert witnesses had the facts highlighted by the United States before them when they formed their opinions and that the experts have been qualified to deliver opinions about Scott's mental competency, this Court finds the expert testimony of Dr. McKenna and Dr. Norman to be more credible than argument and evidence of the United States, and therefore holds that the expert testimony is controlling. Scott's rebutting testimony supports a finding that the expert testimony is controlling.

3. *Findings On Scott's Competency*

22. Based on the testimony of both parties' expert witnesses and the facts as described in Part B, the Court finds that:

(a) Scott was mentally incompetent from January 1985 through early November 1989, including the period in which Scott was in and out of jail in 1987 and 1988.

(b) Scott did not have the capacity to file his 1984 tax return during the years of his incompetency, including the period in which Scott was in and out of jail.

D. *Damages*

23. Scott and the United States have stipulated that Scott made an overpayment of $30,096.00 on his 1984 taxes.

24. Scott and the United States have stipulated that the interest on the $30,096.00 from November 28, 1989 to October 5, 1993 brings the total to $41,327.00.

25. Scott and the United States have stipulated that the interest on the $30,096.00 from April 15, 1985 to October 5, 1993 brings the total to $64,873.00.

26. Scott and the United States have stipulated that the amount awarded by the Court should continue to accrue interest from October 6, 1993.

27. Scott and the United States acknowledge that the Internal Revenue Code provides for interest to the prevailing refund claimant from and after the time he files his refund claim. Nevertheless, Scott argues that the Court should use its equitable powers to award Scott interest from the date his 1984 tax return was due, as the United States has had the use of his money from that date.

CONCLUSIONS OF LAW

1. Given that this Court has found that Scott was mentally incompetent and could not file his 1984 federal income tax return during the period from January 1985 through early November 1989, the issue becomes whether his incompetency will toll the statute of limitations for tax refund cases.

2. The appropriate limitations period for tax refund cases is set forth in 26 U.S.C. §§ 6511.

3. In *Scott v. United States*, 795 F.Supp. 1028 (D.Haw.1992) (*Scott I*), this Court denied the United States' motion to dismiss Scott's complaint. This Court held that principles of equitable tolling apply to tax refund cases, and that mental incompetency constitutes a ground for equitable tolling. *Id.* at 1035. The United States relies on *Oropallo v. United States*, 994 F.2d 25 (1st Cir.1993), which held that equitable tolling principles do not apply in tax refund cases, to request that this Court reconsider its contrary holding in *Scott I*.

4. In holding that equitable tolling principles do not apply in tax refund cases, *Oropallo* relied on *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilberston*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). In *Lampf*, the United States Supreme Court considered whether to adopt a federal limitations period in private suits under section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), and, if so, whether that period would be subject to equitable tolling. The Supreme Court selected the 1-and-3-year limitations periods contained in the 1934 Act and in the original remedial provisions of the Securities Act of 1933, as typified by section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e). *Lampf*, 501

U.S. at 361, 362, 111 S.Ct. at 2781, 2782 n. 9. Section 78i(e) provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. § 78i(e). Citing *Irwin v. Veterans Administration*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), the Supreme Court acknowledged that time limits in law suits are normally subject to equitable tolling. Nevertheless, the Supreme Court found that section 78i(e) was not subject to equitable tolling because equitable tolling is fundamentally inconsistent with the 1-and-3-year structure. *Lampf*, 501 U.S. at ——, 111 S.Ct. at 2782. The *Lampf* Court explained the effect of section 78i(e) as follows: (1) the 1-year period makes tolling unnecessary because that period begins only after the discovery of the facts constituting the violation, and (2) the 3-year period acted as the outside limit for which Congress intended that a plaintiff could bring an action. *Id.* The *Lampf* Court then stated that "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Id.* Thus, the Supreme Court's principal rationale for not applying equitable tolling in *Lampf* was the cutoff provision of section 78i(e).

5. The *Oropallo* court stated "[w]e think that section 6511(a) and (b)(2)(A) are structured like the 1-and-3-period considered by the Supreme Court in *Lampf*," and therefore refused to apply equitable tolling principles to tax refund cases. *Oropallo*, 994 F.2d at 30. *Oropallo* found section 6511(a) to be analogous to the 1-year period in *Lampf*, stating: "We have assumed that a return can be filed at any

time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory." *Id.* *Oropallo* then found section 6511(b)(2)(A)'s limit on the amount of money a taxpayer can recover to be analogous to section 78i(e)'s limit on the institution of a cause of action, stating: "By imposing an 'outside limit' or 'cut-off' on the amount of taxes which can be recovered, section 6511(b)(2)(A) operates like the three-year portion of the limitations period in *Lampf*, and thus is a 'period of repose inconsistent with tolling.'" *Id.* at 31.

6. This Court disagrees with *Oropallo*'s interpretation of section 6511, and therefore finds this section distinguishable from the limitations period in *Lampf*. Because the Supreme Court's principal rationale for not applying equitable tolling in *Lampf* was the cutoff provision of section 78i(e), this Court focuses on *Oropallo*'s analysis of section 6511(b)(2)(A) as a cutoff which is inconsisent with equitable tolling. This Court disagrees with *Oropallo*'s finding that section 6511(b)(2)(A)'s limit on the amount of money a taxpayer can recover is similar to section 78i(e)'s limit on bringing a case. The 3-year period in *Lampf* provides that no "*action* shall be maintained to enforce any liability created under this section, unless brought . . . within three years after such violation." 15 U.S.C. 78i(e) (emphasis added). Thus, this period is a total bar to an action brought outside the required time. Section 6511(b)(2)(A) however is not a total bar, but a limit on the amount of recovery. Section 6511(b)(2)(A) provides that "the credit or refund shall not exceed the portion of the tax paid

during the two years immediately preceding the filing of the claim." 26 U.S.C. § 6511(b)(2)(A). Unlike section 78i(e), section 6511(b)(2)(A) in no way prevents the bringing of a lawsuit, it simply limits the amount of money the taxpayer can recover. Thus, section 6511(b)(2)(A)'s period of repose is significantly different than section 78i(e)'s period of repose and is not inconsistent with equitable tolling.

7. In addition to finding section 6511 distinguishable from the limitations period in *Lampf*, this Court disagrees with *Oropallo* on another basis. *Oropallo* discussed section 6511(a), which requires a taxpayer to file a refund claim within three years of filing a return, or, if no return was filed, within two years from the date the tax was paid. In discussing section 6511(a), the *Oropallo* Court declared this section to be analogous to the 1-year period in section 78i(e), stating:

> In *Lampf*, the Supreme Court commented that the one-year period for filing suit after discovery of facts giving rise to the cause of action made tolling unnecessary. What the Court obviously meant was that once someone who has been defrauded knows the relevant facts, the 1-year period gives that person ample time in which to sue and there is no need to toll the 1-year limitations period. A similar state of knowledge respecting the right to a refund can be attributed to individual calendar year taxpayers who file income tax returns. The return contains all the information necessary to verify that there has been an overpayment of taxes and that a refund is due. Accordingly, the three-year period in section 6511(a) gives the taxpayer ample time to file a refund claim, and there is no need to toll that period.

Oropallo, 994 F.2d at 30 (citations omitted). This Court disagrees with *Oropallo*'s analysis of section 6511(a). If a taxpayer is mentally incompetent, that taxpayer will not necessarily be able to evaluate a tax return to determine whether a right to an overpayment exists. Moreover, in this case no tax return was prepared until 1989 due to Scott's incompetency. Furthermore, the tax return will not always have all the information necessary to verify that there has been an overpayment. Taxpayers must often examine documents collateral to the tax return to determine whether there has been an overpayment. Consequently, this Court finds that section 6511(a) is not analogous to *Lampf*'s 1-year limitations period in section 78i(e).

8. Because this Court disagrees with *Oropallo*'s interpretation of sections 6511 and finds the section distinguishable from the limitations period considered in *Lampf*, this Court declines to follow *Oropallo* and adheres to its earlier decision in *Scott I*, which held that section 6511 may be equitably tolled by mental incompetence under the proper circumstances. The Court discusses the rationale of the *Scott I* holding in more detail below.

9. In *Irwin v. Veterans Administration*, the *United* States Supreme Court stated:

> Once Congress has made such a waiver [of sovereign immunity to allow suits by citizens against the government], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that

> it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.

498 U.S. at 95, 111 S.Ct. at 457. The Supreme Court then held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* The Ninth Circuit has noted the rebuttable presumption established in *Irwin* in *Seattle Audubon Society v. Robertson*, 931 F.2d 590, 595 (9th Cir.1991): "The [*Irwin*] Court held that whenever Congress waives the government's sovereign immunity and permits suits against the government, there is a rebuttable presumption that the doctrine of equitable tolling applies." In the case at bar, the United States has presented insufficient evidence to rebut the presumption that equitable tolling applies against it in tax refund cases.

10. Further, while *Irwin* did not directly hold that mental incompetency constitutes a ground for equitable tolling, *Irwin* supports such a holding. The *Irwin* Court noted that "[f]ederal courts typically have extended equitable relief only sparingly," and then offered two examples of situations where equitable tolling applies: where the claimant has actively pursued his judicial remedies but has filed a defective pleading, and where claimant has been induced or tricked by his adversary into allowing the filing deadline to pass. *Irwin*, 498 U.S. at 94-96, 111 S.Ct. at 457-58. The Supreme Court, however, did not intend these examples to be an exhaustive listing of the situations where equitable tolling applies. The Supreme Court used very broad language when discussing the extent to which equitable tolling applies to the United States, holding that the *same rebuttable presumption* of equitable tolling which applies to suits against private parties applies to suits against the United States. Thus, under *Irwin*, mental incompetency tolls suits against the government to the same extent that it tolls suits against private parties. Furthermore, the *Irwin* Court's use of the language, "federal courts . . . have extended" supports a finding that *Irwin* did not intend its examples to be an exhaustive listing. "Federal courts" includes the lower federal courts as well as the Supreme Court, and therefore lower federal court decisions, as well as Supreme Court decisions, should be examined to determine under what circumstances equitable tolling applies. As discussed below, lower federal courts have ruled that mental incompetency constitutes a ground for equitable tolling, and therefore, under *Irwin*, mental incompetency may toll a federal statute of limitations.

11. The Ninth Circuit has not addressed whether a federal statute of limitations may be equitably tolled by mental incompetence. Indeed, in *Atkins v. Union Pacific Railroad Co.*, 685 F.2d 1146 (9th Cir. 1982), the Ninth Circuit explicitly left open the question of whether a plaintiff's mental incompetency could toll the statute of limitations on the Federal Employers' Liability Act. After finding that the plaintiff had not established facts sufficient to support a finding that he was mentally incompetent, the Court stated:

> Because we find no issue of fact, we need not decide whether the plaintiff's incompetency will ever toll the FELA statute of limitations. *But see, Brooks v. Southern Pacific Co.*, 105 Ariz. 442, 445, 466 P.2d 736, 739 (1970) (holding

that FELA statute of limitations is tolled by incompetence).

Id. at 1148 (citation in original).

12. The cases from other jurisdictions are divided on the issue of whether mental incompetency will toll the statute of limitations. One line of cases hold that mental incompetency may not toll federal statute of limitations. *E.g.*, *Harris v. Ford Motor Co.*, 635 F.Supp. 1472, 1473-74 (E.D.Mo.1986) (and cases cited therein) (mental incompetency does not toll six month statute of limitations for filing a hybrid § 301 LMRA fair representation claim). Most of the decisions relied upon in *Harris*, however, involved claims against the federal government and therefore are called into question by *Irwin*.

13. Another line of cases finds that mental incompetency will toll federal statutes of limitations. *E.g.*, *Nunnally v. MacCausland*, 996 F.2d 1, 4-5 (1st Cir. 1993) (mental illness may toll 30-day filing period set in Civil Service Reform Act, 5 U.S.C. § 7703); *Lopez v. Citibank, N.A.*, 808 F.2d 905, 906-07 (1st Cir.1987) (mental incompetency may toll Title VII statute of limitations); *Wiltgen v. United States*, 813 F.Supp. 1387, 1395 (N.D.Iowa 1992) (mental incompetence may toll statute of limitations in tax refund actions); *Johnsen v. United States*, 758 F.Supp. 834, 835-36 (E.D.N.Y.1991) (same); *Llewellyn v. Celanese Corp.*, 693 F.Supp. 369, 379 (W.D.N.C.1988) (mental incompetency may toll Title VII statute of limitations); *Moody v. Bayliner Corp.*, 664 F. Supp. 232, 235 (E.D.N.C.1987) (same).

14. In *Lopez*, decided before the *Irwin* decision, the First Circuit held that while there in no absolute rule of equitable tolling on the grounds of mental

incompetency in Title VII cases, federal courts may toll the applicable statute of limitations on a case-by-case basis. The First Circuit initially acknowledged the line of cases finding against such tolling. *Lopez*, 808 F.2d at 906. It distinguished these cases on the basis that most involved suits against the United States and concerned "considerations of sovereign immunity."[1] *Id.* at 906-07. It then found that "an even longer line of common law authority finds, in insanity, a ground for tolling a limitations period." *Id.* at 907 (citing *Developments in the Law-Statutes of Limitations*, 63 Harv.L.Rev. 1177, 1229 (195)). Consequently, the *Lopez* Court found that mental incompetency could equitably toll the statute of limitations. The First Circuit has recently affirmed its position in *Lopez* in a post-*Irwin* decision, *Nunnally v. MacCausland*, 996 F.2d at 4-5.

15. In *Char v. Matson Terminals, Inc.*, 817 F.Supp. 850, 854-55 (D.Haw.1992), this Court adopted the reasoning of the Lopez line of cases. In accord with *Char*, this Court once again adopts the reasoning of the *Lopez* line of cases, especially in light of the fact that the cases cited in *Lopez* for the position that mental incompetency will not toll federal statutes of limitations have been called into question by *Irwin*. Hence, this Court holds that, pursuant to *Irwin v. Veterans Administration*, mental incompetency may toll the statute of limitations in tax refund cases when the appropriate circumstances are present. This holding is supported by fundamental principles of equity. Fundamental principles of equity mandate that when a person suffers from a disease rendering

---

[1] These cases have been called into question by *Irwin*.

him mentally incompetent to assert his rights during the period he was incapacitated, time limitations should not operate to preclude him from seeking redress for his injuries.

16. In *Scott I*, this Court declined to determine whether alcoholism created the sort of mental incompetency necessary for equitable tolling. Based on the expert testimony in this case, this Court now finds that the disease of alcoholism can create the sort of mental incompetency necessary for equitable tolling.[2] The issue of whether a particular taxpayer

---

[2] The Court notes that its holding that alcoholism may create the type of mental incompetency to toll the statute of limitations is supported by Hawaii state law. Haw.Rev.Stat. § 657-13 provides that a state statute of limitations is tolled when a person is insane at the time the cause of action has accrued. In *Christian v. Waialua Agric. Co.*, 31 Haw. 817, *appeal dismissed*, 52 F.2d 847 (9th Cir.1931), *questioned on other grounds, Sandstrom v. Larsen*, 59 Haw. 491, 495, 583 P.2d 971, 975 (1978) (questioning *Christian*'s finding that the Hawaii Supreme Court could independently review evidence and make its own findings), the Hawaii Supreme Court stated:

> In 32 C.J. 594 (§ 4), the author of the text says: " 'Insanity' is a broad, comprehensive, and generic term, of ambiguous import, for all unsound and deranged conditions of the mind. . . . And it ordinarily implies every degree of unsoundness of the mind, whether it is casual, temporary, or permanent, [and] whether of a mild or violent form; and it includes not only that derangement of the mind produced by disease of the brain, such as is recognized by law as a defense to crime, which is the sole product of it, *but it may also embrace conditions of subverted reason, such as may be produced by intoxication.* The word has been frequently used to designate all

suffers from severe enough alcoholism to cause mental incompetency should be analyzed on a case-by-case basis. *See Lopez*, 808 F.2d at 907 (equitable tolling for mental incompetence is analyzed on a case-by-case basis). The experts in this case have testified that Scott's alcoholism was sufficiently severe to cause him to be mentally incompetent. Based on this expert testimony and other evidence adduced, this Court has found that Scott's alcoholism caused him to be mentally incompetent and incapable of filing a tax return from at least January 1985 through early November 1989.

17. The United States argues that this Court should not apply equitable tolling in cases where alcoholism has caused mental incompetency on policy grounds that alcoholism results in staggering costs on society and the Court should only apply equitable principles when it is in society's best interest, as equity is " 'to live honestly, to harm nobody, to render every man his due.' " United States' Trial Brief, at 16 (quoting Justinian's Inst. lib. 1, tit. 1, § 3). The experts in this case have testified that alcoholism is a disease and not a wrongful or reprehensible act,

---

> mental impairments and deficiencies formerly embraced in terms 'idiocy,' 'lunacy,' and 'unsoundness of mind.' "

Christian, 31 Haw. at 902 (emphasis added). Under the definition in *Christian*, alcoholism would constitute insanity or mental incompetence which would allow for equitable tolling.

The Court also notes that the United States Supreme Court case of *Kendall v. Ewert*, 259 U.S. 139, 42 S.Ct. 444, 66 L.Ed. 862 (1922), supports its holding that alcoholism may create the type of mental incompetency to toll the statute of limitations. In *Kendall*, the Supreme Court recognized that habitual drunkards are not competent to transact business, even if they have their sober moments. *Id.* at 146, 42 S.Ct. at 447.

and therefore equitable principles may be applied to cases where alcoholism causes mental incompetency.

18. In alternative to the *Irwin* principles discussed above, this Court holds that the impossibility doctrine discussed in *Seattle Audubon* and *Forti v. Suarez-Mason* apply to toll the statute of limitations in the case at bar. *Seattle Audubon*, 931 F.2d 590; *Forti*, 672 F.Supp. 1531 (N.D.Cal.1987). As stated in *Seattle Audubon*, when "extraordinary circumstances beyond plaintiffs' control make it impossible to file the claims on time," equitable tolling applies. 931 F.2d at 595; *Forti v. Suarez-Mason*, 672 F.Supp. at 1550 (N.D.Cal.1987) ("Where extraordinary events which are beyond plaintiff's control prevent a plaintiff from bringing his claim, the limitations period is tolled until the barrier caused by these events is removed."). Both experts have testified that Scott's alcoholism, a disease, caused Scott to be mentally incapable of filing his tax return. Thus, this Court holds that Scott's alcoholism constitutes extraordinary circumstances beyond Scott's control [3] which made it impossible for him to file his tax return, and therefore, under *Seattle Audubon* and *Forti*, the limitations period in section 6511(a) was tolled during Scott's mental incompetency. The Court notes that the United States has not shown that it has been unjustly prejudiced by the tolling of the statute of limitations. *See Seattle Audubon*, 931 F.2d at 597.

19. Given the above, Scott's refund action is not time-barred and he is entitled to a refund of his

[3] In ruling that Scott's alcoholism constitutes extraordinary circumstances beyond his control, this Court relies heavily upon the expert testimony opining that alcoholism is a disease.

overpayment of $30,096.00 for the 1984 taxable year. Scott is also entitled to interest on the overpayment. Under 26 U.S.C. § 6611, Scott is entitled to interest from the date he filed his return. The Court declines Scott's invitation to use its equitable powers to allow Scott interest from the date of the overpayment. Hence, pursuant to the parties' stipulation, interest on the $30,096.00 from November 28, 1989 to October 5, 1993 brings the total to $41,327.00. The Court also holds that the interest owed to Scott continues to accrue from October 6, 1993.

20. There being no just reason for delay, the Court hereby directs entry of final judgment in favor of Scott as specified above.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civ. No. 92-00011 ACK

NICHOLAS T. SCOTT, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed June 4, 1992]

ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

KAY, Chief Judge.

I. INTRODUCTION

This case presents an issue of first impression in the Ninth Circuit. The major issue presented is whether the time limit restrictions for filing a tax refund claim are subject to the doctrine of equitable tolling. Based upon the following analysis of the relevant authorities, the Court holds that tax refund claims are subject to equitable tolling and that a plaintiff's mental incompetency operates to toll the limitations period for the time that the plaintiff was mentally incompetent.

II. BACKGROUND

In 1984, Plaintiff Nicholas Scott's ("Plaintiff") father timely filed a tax return on Plaintiff's behalf for that year. Plaintiff claims that his father overpaid the amount of taxes due in 1984, which were paid in piecemeal installments in 1984 and 1985. Plaintiff seeks to have a portion of the alleged 1984 overpayment applied to his tax liabilities for the years 1985, 1986, and 1988. Plaintiff admits that he filed his returns for the 1984-1988 years on November 28, 1989. On January 8, 1992, after the IRS disallowed his refund claim for the $30,096.00 overpaid in the 1984 tax year, Plaintiff filed a complaint seeking to apply the amount of his overpaid taxes to his liabilities for the 1984, 1986, and 1988 tax years.[1]

Both of the parties agree that the statute of limitation for filing such a return has expired. *See*, Complaint at 2 ("Plaintiff contends that the time limitations contained in 26 U.S.C. Section 6511(a) are subject to the doctrine of Equitable Tolling"); *see also*, Plaintiff's Response at 2 (arguing that the statute of limitations should be tolled). 26 U.S.C. § 6511(a) provides that a claim for credit or refund must be filed within three years of the time the return was filed or two years from the date the tax was paid.

In this case, Plaintiff made his last payment in 1985. Plaintiff filed his refund return on November 28, 1989, four years after the tax was paid. Under the statute, Plaintiff is precluded from pursuing his claim because he filed his refund more than two years

---

[1] Whether Plaintiff in fact overpaid his taxes for 1984, and by how much, is not before the Court on the instant motion.

after the 1984 taxes were paid and more than three years after the date of the 1984 return.

Defendant the United States America ("United States" or "the government") moves to dismiss on the grounds that this Court lacks subject matter jurisdiction to hear a refund claim filed after the statutory period under § 6511(a) has elapsed or for failure to state a claim upon which relief can be granted or in the alternative, for summary judgment. Plaintiff opposes, claiming that the doctrine of equitable tolling applies to vest this Court with jurisdiction. Plaintiff claims that as a result of severe and continuous alcoholism, he was mentally incompetent for the period of time 1984-1990 warranting application of the equitable tolling doctrine. Because the only issues presented by the instant motions are ones of law, and not of fact, the Court construes the government's motions as a single motion to dismiss.

The narrow issue presented by this case, then, is whether the time period for filing a claim for refund under § 6511(a) may be extended under the doctrine of equitable tolling. Since the doctrine does apply to such claims, the Court must also determine if mental incompetency may toll the statute of limitations. Because the parties have not raised or briefed the issue, the Court withholds ruling on the question of whether Defendant was in fact mentally incompetent for the relevant time period. Likewise, the Court also expresses no opinion as to whether, as a matter of law, alcoholism may give rise to mental incompetency.

III. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

Under Fed.R.Civ.P. 12, this Court must accept as true the plaintiff's allegations contained in the complaint and view them in a light most favorable to the plaintiff. *See, Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 334 (9th Cir.1990); *Shah v. County of Los Angeles*, 797 F.2d 743, 745 (9th Cir. 1986). Thus, the complaint must stand unless it appears beyond doubt that the plaintiff has alleged no facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Balistreri*, 901 F.2d at 699; *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir.1984).

In essence, as the Ninth Circuit has stated, "[t]he issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.), *cert. denied*, 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979). The Court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiffs' claims. *Id.*

In his complaint and moving papers Plaintiff claims to have been mentally incompetent as a result of his severe alcoholism to such an extent that he could not manage his business or day-to-day affairs. Accordingly, the Court accepts as true, for the purposes of this motion only, Plaintiff's allegation that he was completely and continuously mentally incompetent for the relevant time period.

B. THE MERITS

1. *Tax Refund Claims are Subject to Equitable Tolling.*

The government contends that statutes of limitations covering suits against the United States are prerequisites to federal court jurisdiction. *E.g.*, *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 2229, 90 L.Ed.2d 841 (1986) (statute of limitations defines extent of court's jurisdiction). While this contention is true as a general proposition, the Supreme Court has recognized exceptions to strict application of time-bar rules. In support of its motion to dismiss, the government cites numerous cases all of which pre-date the Supreme Court's recent decision in *Irwin v. Veterans Admin.*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). The *Irwin* Court recognized that the statute of limitations may be equitably tolled even where the statute of limitations is a prerequisite to federal court jurisdiction, rendering the cases cited by the government inapplicable.

In *Irwin*, the plaintiff filed an untimely civil action under Title VII based on a claim that the Veterans Administration unlawfully discharged plaintiff because of his race and physical disability. The plaintiff, Irwin, failed to file suit within 30 days of receiving the EEOC's notice rejecting his claim. Irwin claimed that he failed to file because the EEOC letter was sent to his attorney's office while his attorney was on vacation. As a result of his late receipt of the letter, Irwin filed suit 44 days after the letter arrived at his attorney's office.

After finding that Irwin's complaint was untimely, the Court considered whether his error may be excused under equitable tolling principles. The Court viewed this case as an opportunity to adopt "a general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 111 S.Ct. at 457. The Court stated:

> Once Congress has made such a waiver [of sovereign immunity to allow suits by citizens against the government], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.

Id. The Court then held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.*

The Court went on to state that federal courts have used equitable tolling only "sparingly." *Id.* The Court then offered two non-exhaustive examples of where the Court has previously recognized equitable tolling: where the claimant has actively pursued his judicial remedies but has filed a defective pleading and where claimant has been induced or tricked by his adversary into allowing the filing deadline to pass. *Id.* at 457-8.

The Court held that Irwin's failure to timely file was a result of excusable neglect. *Id.* at 458 ("[T]he principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect.").

While *Irwin* involved an untimely Title VII claim, the reasoning in that decision applies with equal force to untimely tax claims. As in tax cases, the statute of limitations applicable to Title VII cases has been interpreted as a prerequisite to federal court jurisdiction. *See, Irwin* at 455. In *Irwin*, the Court held that such late-filed claims are not jurisdictionally barred when the doctrine of equitable tolling applies.

A recent District Court opinion from the Second Circuit has applied *Irwin* to facts similar to the instant case. In *Johnsen v. United States*, 758 F.Supp. 834 (E.D.N.Y.1991), the Court held that under *Irwin*, the plaintiff's mental incompetency equitably tolled the statute of limitation on a tax refund claim.

In 1983, the Multzmans overpaid their taxes by approximately $25,000. They did not file a return as the result of mental incompetency.[2] After Plaintiff Johnsen was appointed as Mrs. Multzman's representative, Johnsen filed a return on Mrs. Multzman's behalf and subsequently in 1989 filed an action for refund of the overpaid taxes. Although both the return and the complaint were untimely, the Court held that the statute of limitations was tolled for the period that Mrs. Multzman was mentally incompetent. *Johnsen*, 758 F.Supp. at 836 (so holding "under the authority of *Irwin*").

[2] In the *Johnsen* case, the government stipulated, for purposes of the motion, that Mrs. Multzman, her husband, and her son were all mentally incompetent in 1983.

The Court noted that the legislative history of Section 6511 "is absolutely devoid of any indication that Congress intended to preclude such equitable tolling in tax refund actions." *Id.* at 835-6.

In this case, Plaintiff has alleged, and has offered supporting affidavits, that he was totally and continually mentally incompetent to manage his affairs during the time period 1984-1990. *See*, Complaint at 4-5; Plaintiff's Response Memorandum at 2; Affidavits attached as exhibits 9 and 11 to Plaintiffs Response Memorandum. While it may be unlikely that Plaintiff will ultimately prevail in convincing the Court that he was, in fact, mentally incompetent, on a motion to dismiss the Court must draw all reasonable inferences in his favor. In light of this standard, this case is quite similar to *Johnsen*. That is, Plaintiff alleges that he was mentally incompetent to file his returns and institute a lawsuit during the statutory period. Assuming for the purposes of this motion that Plaintiff was incompetent, the principles of equitable tolling should apply as under the *Johnsen* case.[3]

In support of its motion to dismiss, the United States relies heavily upon *United States v. Dalm*, 494 U.S. 596, 110 S.Ct. 1361, 108 L.Ed.2d 548 *reh. denied*, 495 U.S. 941, 110 S.Ct. 2195, 109 L.Ed.2d 523 (1990). The government contends that *Dalm* stands for the proposition that equitable tolling does not apply to tax refund cases. However, *Dalm* did not discuss equitable tolling, but instead dealt

[3] *See also*, the discussion on mental incompetency, *infra*.

with the entirely distinct tax doctrine of equitable recoupment.

In *Dalm*, Frances Dalm was appointed as the administratrix to the estate of her former employer, to whom she had been a loyal secretary for many years. The former employer's brother paid her over $300,000 in addition to the money she received from the estate. She declared the $300,000 as a gift for taxation purposes. The IRS later determined that the $300,000 should have been reported as income and assessed a deficiency against Dalm.

Dalm brought suit against the IRS in Tax Court for redetermination of the alleged deficiencies. After two days of trial, Dalm and the IRS settled the case for a specified sum labeled as "income tax." At trial Dalm did not claim to be entitled to a recoupment for the "gift tax" she had previously paid.

Immediately after entering the settlement, Dalm filed for a refund of the gift tax previously paid. After the IRS denied the claim, Dalm filed suit. By the time she filed her complaint, Dalm's suit had been barred by the statute of limitations, § 6511, for six years.

The Court framed the issue in *Dalm* as follows:

> The question presented is whether, the statute of limitations long since having run, the doctrine of equitable recoupment supports a separate suit for refund of the earlier paid gift tax after the taxpayer settled the Tax Court deficiency proceeding and agreed to pay income tax on the transaction.

Dalm 110 S.Ct. at 1363. As the Court explained, the doctrine of equitable recoupment operates to allow a

taxpayer, in certain specified circumstances, to recoup or offset any previously overpaid taxes against his current taxes notwithstanding the fact that the statute of limitation for filing a refund on the previous taxes has run. *See id.* at 1366. Significantly, equitable recoupment may only be raised when there is an ongoing lawsuit for an income tax deficiency. *See id.* The Court stated that equitable recoupment "is in the nature of a *defense* arising out of some feature of the transaction upon which the plaintiff's action is grounded." *Id.* at 1366-7 (citation omitted; emphasis supplied).

In refusing to apply equitable recoupment to Dalm's claim the Court summarized the doctrine as follows: "a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction." *Id.* at 1368. The Court emphasized that Dalm was not raising equitable recoupment as a *defense*, but rather as an independent basis for jurisdiction. *Id.* ("[W]e have not allowed equitable recoupment to be the sole basis for jurisdiction.")

On the jurisdictional point, the Court stated that although time-bar restrictions should not be construed unduly restrictively, they should not be interpreted to extend the waiver of sovereign immunity beyond that which Congress intended. *Id.* The Court then stated that its previous holdings—that equitable recoupment could be raised as a defense—did not suspend the jurisdictional rules. To extend those holdings to allow equitable recoupment as an independent basis of jurisdiction, however, would impermissibly contravene Congress's intent.

The Court cited 26 U.S.C. §§ 1311-1314 as further evidence of Congress's intent not to extend equitable recoupment. Those sections permit a taxpayer who has been required to pay inconsistent taxes to seek a refund otherwise barred by the statute of limitations, i.e. § 6511(a). Sections 1311-1314 are exceptions to § 6511 in instances where a taxpayer has been *required* to pay *inconsistent* taxes. In this extremely limited area of the tax code, Congress has spoken and the Court reasoned that it should not override Congress's judgment to create an additional exception. *Id.* at 1369.

The *Dalm* case is distinguishable from *Irwin*. In *Dalm* the issue was very narrow: Whether the doctrine of equitable recoupment could serve as an independent basis for federal jurisdiction. Essential to the Court's analysis was the fact that Dalm could have, but did not, raise that claim in the prevous Tax Court litigation. *Dalm* at 1370. *Irwin* contemplates an entirely different situation. The *Irwin* Court sought to soften the sometimes harsh effect of statutes of limitations when they operate to deny a litigant the opportunity to seek redress for an injury. In *Dalm*, the plaintiff had such an opportunity but failed to capitalize on it. Additionally, the *Dalm* Court emphasized that Congress already provides methods to mitigate the harsh rule of the statute of limitations in *certain limited* tax matters, i.e. those matters where the taxpayer is required to pay tax on inconsistently taxable items (e.g. "gift" and "income"). Congress has not expressed such an intent in the other areas of the tax code. *Johnsen v. United States*, 758 F.Supp. at 835-836 (The legislative history of the statute of limitations "is absolutely devoid

of any indication that Congress intended to preclude such equitable tolling in tax refund actions." (citing to legislative history)). Thus, the holding in *Dalm* was limited to the area of inconsistently taxable items under §§ 1311-1314.

The dissenting opinion in *Dalm* further suggests that the rule from the majority opinion has limited application. Justice Stevens, writing for two other Justices, stated that "[t]his is not a decision that will be much celebrated or often cited." *Id.* at 1370 (Stevens, J., dissenting). He also noted that "[f]ew cases are affected, and not a single brief *amicus curiae* was filed." *Id.* He concluded that the case "has no apparent importance." *Id.* It can be inferred from the dissent's comments that the Court, and indeed other members of the legal community, did not contemplate or intend that this case have the far-reaching effect that the government claims it does.

Moreover, *Irwin* was decided by the same Court only nine months after *Dalm*. Had the Court viewed *Dalm* as a limit to *Irwin*, it likely would have so stated. Indeed, if *Dalm* stood for the proposition that equitable tolling does not apply to tax refund cases, as the government asserts, the *Irwin* Court would have cited *Dalm* as an example of how the federal courts apply equitable tolling "only sparingly." However, the *Irwin* Court does not even mention *Dalm*. Because *Dalm* and *Irwin* dealt with different principles, *Dalm* with the narrow issue of equitable recoupment and *Irwin* with the broad principle of equitable tolling, this Court will not apply *Dalm* to the instant case.

The government also relies upon *Vintilla v. United States*, 931 F.2d 1444 (11th Cir.1991), a case decided after *Irwin* and *Dalm*. In *Vintilla*, the Eleventh Cir-

cuit Court of Appeals applied *Dalm* and only cursorily mentioned *Irwin* in a footnote. The Court stated that "general principles of equity may not override statutory requirements for timely filing of tax refund claims." *Vintilla* at 1446. The Court cited the language in *Dalm* that time-bar provisions are not to be construed unduly restrictively but courts must not extend the waiver beyond that which Congress intended. The Court then held that allowing equitable tolling would do little more than override the judgment of Congress in making exceptions to the tax code statute of limitations.

However, in *Dalm*, the Court stated that, "Congress has legislated a set of exceptions to limitations prescribed by §§ 7422 and 6511(a) . . . . known as . . . §§ 1311-1314." *Dalm* at 1369 (emphasis supplied). These exceptions apply in very limited circumstances and were not intended as the exclusive equitable exceptions for all types of claims. Indeed, the *Dalm* Court stated that §§ 1311-1314 are limited exceptions to the general statute of limitations, those exceptions being relevant only to inconsistently taxed items. *Dalm* at 1369 (§§ 1311-1314, "in specified circumstances, permit a taxpayer who has been required to pay inconsistent taxes to seek a refund of a tax the recovery of which is otherwise barred by §§ 7422(a) and 6511(a)."). Thus, §§ 1311-1314 only apply to the narrow circumstances of permitting equitable recoupment for inconsistently taxed items and do not contemplate other situations where equity may require tolling of the general statute of limitations period as described in §§ 7422 and 6511(a).

In a single footnote, the *Vintilla* Court saw fit to dispose of *Irwin* with little, if any, analysis. In footnote 1, the Court quoted the language of *Irwin* that

equitable tolling is applicable to the government to the same extent as it applies to private parties. The Court went on to state that "[t]he *Irwin* Court made no attempt to reconcile this language with the seemingly contradictory language of *Dalm*." *Vintilla* at 1447, n. 1. The *Vintilla* Court likewise made no such attempt. The Court gave no basis whatsoever for following *Dalm* instead of *Irwin*. The Court did however, list the two equitable tolling categories discussed in *Irwin*[4] and went on to conclude, without further discussion, that the plaintiffs did not fit into these categories. *Id.*

In reaching its conclusion, the *Vintilla* Court characterized the equitable tolling categories in *Irwin* as the only two instances in which equitable tolling is warranted. The language of the *Irwin* decision does not support that characterization. The *Irwin* Court first noted that "[f]ederal courts typically have extended equitable relief only sparingly." *Irwin* at 457. The Court then listed instances where it, the Supreme Court, has so extended equitable relief—the two categories discussed in *Vintilla*. *Irwin* at 457-458. The *Irwin* Court's language indicates that the Court did not purport to list the only categories of equitable tolling available to litigants, but rather simply stated the two instances where the Court has had occasion to consider equitable tolling principles. *See, id.* 111 S.Ct. at 458, n. 2 and n. 3 (citing only Supreme Court opinions).

---

[4] As discussed above, the two categories discussed by the *Irwin* Court are (1) where the claimant actively pursues his judicial remedies by filing a defective pleading during the statutory period and (2) where the claimant has been tricked or induced by his adversary's misconduct into allowing the filing deadline to pass. *Irwin* at 458.

As discussed below, the Circuit and District Courts have extended equitable tolling to categories other than those in Supreme Court opinions, one such category being a plaintiff's mental incompetency. Presumably, the Supreme Court did not overrule all cases applying equitable tolling principles inconsistent with the two categories the Court has previously considered. It makes better sense to read the Court's opinion in light of the lower federal court opinions on the subject. This reading would account for the Court's use of the language, "federal courts . . . have extended." Surely "federal courts" include the lower federal courts as well as the Supreme Court. If the Court had intended to limit equitable tolling to the two narrow categories discussed in the *Irwin* opinon, the Court would have so stated. Instead, however, the Court used broad language in discussing the extent to which equitable tolling principles are applicable in suit against the United States. The Court held that "the *same* rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 111 S.Ct. at 457. Since courts have applied equitable tolling principles other than the two categories discussed in *Irwin*, the *Irwin* categories must be read as non-exhaustive examples. Accordingly, the Court finds that the categories listed by the Court in *Irwin* are not exclusive.

The Court finds *Irwin* controlling and holds that the principles of equitable tolling apply to tax refund claims to the same extent that those principles apply to private parties. In that regard, this Court's holding is consistent with the *Johnsen* case. The instant case is very similar to the *Johnsen* case given the fact that on a motion to dismiss, the Court must accept

as true Plaintiff's assertion that he was mentally incompetent from 1984-1990. The *Dalm* case is distinguishable on its facts and on the law applied therein. Because the government moves to dismiss on jurisdictional grounds, claiming that the statute of limitations may not be tolled as a matter of law, the Court denies the government's motion.

2. *Mental Incompetency Tolls the Statute of Limitations.*

Neither of the parties have adequately briefed the issue of whether, as a matter of law, mental incompetency may equitably toll the statute of limitations; however, there is some federal case law on point. The Ninth Circuit has recognized that a statute of limitations may be equitably tolled when "extraordinary circumstances beyond plaintiff['s] control made it impossible to file the claim[] on time." *Seattle Audubon Society v. Robertson*, 931 F.2d 590 (9th Cir.1991). The Ninth Circuit has not yet considered whether mental incompetency so tolls a statute of limitations. Other courts, however, have held that mental incompetency will equitably toll the statute of limitations. The *Johnsen* case, *supra*, held that mental incompetency tolls the statute of limitations for filing a tax refund claim. Additionally, a District Court in the Sixth Circuit has held that

> as a matter of federal law, in [a] . . . suit between private parties, the period for filing a charge with the [EEOC] may be tolled, in the discretion of the Court, for that period of time during which the claimant was adjudicated mentally incompetent.

Basset v. Sterling Drug, Inc., 578 F.Supp. 1244, 1248 (S.D.Ohio); *compare, Lopez v. Citibank, N.A.*, 808 F.2d 905 (1st Cir.1987) (mental incompetency for tolling purposes considered under a case-specific analysis rather than an absolute rule). Fundamental principles of equity mandate that when a person suffers from a disease rendering him mentally incompetent to assert his rights during the period he was incapacitated, time limitations should not operate to preclude him from seeking redress for his injuries.

In light of the *Johnsen* and *Basset* cases, the Court finds that mental incompetency may, in appropriate cases, toll the statute of limitations for filing a tax refund action.

IV. CONCLUSION

The Court finds, under the authority of *Irwin*, that equitable tolling principles apply to tax refund claims. The Court also finds persuasive the *Johnsen* case, which held that mental incompetency will equitable toll the tax code statute of limitations for refund claims. The *Dalm* decision dealt with the narrow issue of equitable recoupment and therefore does not apply here. Accordingly, the United States' motion to dismiss is denied.

MOTION DENIED.